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REPORTS
OF
CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE
SUPREME COURT OF ILLINOIS.

VOLUME 289.
CONTAINING CASES IN WHICH OPINIONS WERE FILED IN OCTOBER,
1919, AND CASES WHEREIN REHEARINGS WERE DENIED
AT THE OCTOBER TERM, 1919.

o SAMUEL PASHLEY IRWIN,
REPORTER OF DECISIONS.

BLOOMINGTON, ILL.
1920.

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JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

FRANK K. DUNN, CHIEF JUSTICE.

JAMES H. CARTWRIGHT,	}	JUSTICES.
WILLIAM M. FARMER,		
ORRIN N. CARTER,		
WARREN W. DUNCAN,		
CLYDE E. STONE,		
FLOYD E. THOMPSON,		

ATTORNEY GENERAL,
EDWARD J. BRUNDAGE.

REPORTER OF DECISIONS,
SAMUEL PASHLEY IRWIN.

CLERK,
CHARLES W. VAIL.

NEW RULE IN COMPENSATION CASES.

On account of the amendment of the Compensation law in force July 1, 1919, limiting the review of judgments in compensation cases to those in which the Supreme Court shall allow a writ of error, the following rule was adopted October 27, 1919:

RULE 43. In case application shall be made for a writ of error to review any judgment or order of court under the Workmen's Compensation act there shall be filed a petition for the writ signed by the applicant or his attorney, together with a transcript of the proceedings and judgment of the trial court, with an assignment of errors written upon or attached to the transcript, and with proof of notice to the respondent. There shall be filed with such transcript the original files of the trial court. The petitioner shall file with his petition an abstract of the record, prepared in accordance with rules 14 and 16 of this court. The petition shall contain a concise statement of the case and of the points and authorities relied upon for the issuance of the writ. Twelve copies of such petition and abstract shall be filed with the clerk of this court within the time allowed by said Workmen's Compensation act for the filing of said petition asking for a writ of error. If the petition is filed in vacation the respondent may file a reply within seven days after notice of the filing of the petition, and if the petition is filed at a term a reply may be filed on or before the following Tuesday. Such reply shall state briefly and concisely the points and authorities relied upon to meet or obviate the alleged errors and sustain the judgment, which reply shall constitute an appearance in the case. Twelve copies of such reply shall be filed. Oral arguments will not be heard upon such application. In case the writ shall not be granted the transcript of the record of the trial court shall be returned forthwith to the clerk of the court from which the record was brought. The application shall be docketed, "....., *Petitioner, vs., Respondent.*" If the petition shall be granted the cause shall be docketed thereafter as in cases of ordinary writs of error, the petitioner being designated as plaintiff in error, but shall retain the original number of the petition, and no additional docket fee shall be required of the petitioner. A *scire facias* to hear errors shall be issued in the manner provided by rule 6, returnable on the first day of the next term for all respondents who have not appeared in opposition to the petition. If the petition is granted the cause shall proceed as if pending on writ of error. Either party may file a further brief or abstract or submit the cause on the petition and abstract or reply filed by such party on the application for the writ.

TABLE OF CASES

REPORTED IN THIS VOLUME.

A	PAGE.
Adams <i>ads.</i> People. (Duncan, J.).....	339
Adams Express Co. <i>ads.</i> Hooper. (Dunn, C. J.).....	169
Allen <i>ads.</i> People. (Cartwright, J.).....	218
Appleton <i>ads.</i> McKaig. (Farmer, J.).....	301
Arlow <i>ads.</i> Liberty Foundries Co. (Stone, J.).....	601

B	
Barber <i>ads.</i> People <i>ex rel.</i> (Cartwright, J.).....	556
Barnes <i>v.</i> Gulliford. (Farmer, J.).....	538
Barth <i>ads.</i> Peabody Coal Co. (Duncan, J.).....	449
Barto <i>v.</i> Kellogg. (Cartwright, J.).....	528
Bauerdorf <i>v.</i> Woodworth. (Farmer, J.).....	579
Big Muddy Coal and Iron Co. <i>v.</i> Industrial Com. (Stone, J.)	515
Binger <i>ads.</i> People. (Farmer, J.).....	582
Bishop <i>v.</i> Chicago Junction Ry. Co. (Stone, J.).....	63
Blanchard Bro. & Lane <i>v.</i> Gay Co. (Duncan, J.).....	413
Bondurant <i>ads.</i> Trustees of Eureka College. (Farmer, J.)....	289
Bowman <i>v.</i> Industrial Com. (Carter, J.).....	126
Brak <i>ads.</i> Weber. (Stone, J.).....	564
Bransfield <i>ads.</i> People. (Stone, J.).....	72
Brennan <i>v.</i> Industrial Com. (Farmer, J.).....	49
Bullington <i>v.</i> Peabody Coal Co. (Carter, J.).....	330
Bushnell <i>v.</i> Cooper. (Thompson, J.).....	260

C	
Campbell <i>ads.</i> Linn. (Thompson, J.).....	347
Carter <i>ads.</i> Elmore. (Cartwright, J.).....	560
Chicago & Alton Ry. <i>ads.</i> People <i>ex rel.</i> (Thompson, J.).....	282

	PAGE.
Chicago, City of, <i>ads.</i> Hanrahan. (Duncan, J.).....	400
Chicago, City of, <i>v.</i> Lost. (Cartwright, J.).....	605
Chicago, City of, <i>v.</i> Max. (Carter, J.).....	372
Chicago, City of, <i>v.</i> Washingtonian Home. (Stone, J.).....	206
Chicago, City of, <i>v.</i> Witt. (Carter, J.).....	520
Chicago City Ry. <i>ads.</i> Rainford. (Cartwright, J.).....	427
Chicago & East. Ill. R. R. <i>ads.</i> Johnston City. (Thompson, J.)	407
Chicago Junction Ry. Co. <i>ads.</i> Bishop. (Stone, J.).....	63
Chicago Railways Co. <i>ads.</i> Feldman. (Stone, J.).....	25
Chicago & Western Ind. R. R. <i>ads.</i> Curran. (Thompson, J.)	111
Christley <i>ads.</i> Garden City Sand Co. (Stone, J.).....	617
Clark County <i>ads.</i> Jones. (Stone, J.).....	535
Consumers Mutual Oil Co. <i>v.</i> Industrial Com. (Stone, J.)...	423
Continental Beneficial Ass'n <i>ads.</i> People <i>ex rel.</i> (Farmer, J.)..	40
Cook County <i>ads.</i> Polish Manual Train. School. (Duncan, J.)	432
Cook County <i>ads.</i> St. Hedwig's Indus. School. (Duncan, J.)..	432
Cooper <i>ads.</i> Bushnell. (Thompson, J.).....	260
Curran <i>v.</i> Chicago & Western Indiana R. R. (Thompson, J.)..	111
Cutler <i>v.</i> Garber. (Dunn, C. J.).....	200

D

Danks <i>ads.</i> People. (Thompson, J.).....	542
Davis <i>ads.</i> Farmer. (Farmer, J.).....	392
Deke <i>v.</i> Huenkemeier. (Duncan, J.).....	148
Diamond Livery <i>v.</i> Industrial Com. (Thompson, J.).....	591
Downing <i>ads.</i> Moore. (Thompson, J.).....	612
Dubia <i>ads.</i> People. (Cartwright, J.).....	276

E

Elmore <i>v.</i> Carter. (Cartwright, J.).....	560
Eureka College <i>v.</i> Bondurant. (Farmer, J.).....	289

F

Farmer <i>v.</i> Davis. (Farmer, J.).....	392
Farmers' Grain Co. <i>v.</i> Kane. (Dunn, C. J.).....	532
Farwell <i>v.</i> Pyle-National Elec. Headlight Co. (Dunn, C. J.)..	157
Feldman <i>v.</i> Chicago Railways Co. (Stone, J.).....	25

	PAGE.
Flack <i>ads.</i> Harris. (Stone, J.).....	222
Flemming <i>v.</i> Tallerday. (Farmer, J.).....	508
Ford <i>ads.</i> People <i>ex rel.</i> (Cartwright, J.).....	550

G

Gale <i>v.</i> Mundy. (Farmer, J.).....	142
Garber <i>ads.</i> Cutler. (Dunn, C. J.).....	200
Garden City Sand Co. <i>v.</i> Christley. (Stone, J.).....	617
Gay Co. <i>ads.</i> Blanchard Bro. & Lane. (Duncan, J.).....	413
Geister <i>ads.</i> People. (Duncan, J.).....	249
Glos <i>ads.</i> Schmidt. (Dunn, C. J.).....	576
Green <i>ads.</i> Indiana Harbor Belt R. R. (Stone, J.).....	81
Gruenewald <i>ads.</i> Munie. (Thompson, J.).....	468
Gulbransen-Dickinson Co. <i>v.</i> Tummy. (Cartwright, J.).....	458
Gulliford <i>ads.</i> Barnes. (Farmer, J.).....	538

H

Hannibal <i>ads.</i> Illinois Indemnity Exchange. (Carter, J.).....	233
Hanrahan <i>v.</i> City of Chicago. (Duncan, J.).....	400
Hanson <i>ads.</i> Svenson. (Thompson, J.).....	242
Harris <i>v.</i> Flack. (Stone, J.).....	222
Hayward <i>v.</i> Mississippi River Power Co. (Dunn, C. J.).....	353
Hedges <i>ads.</i> People <i>ex rel.</i> (Farmer, J.).....	378
Hooper <i>v.</i> Adams Express Co. (Dunn, C. J.).....	169
Hotaling <i>ads.</i> Consumers Mutual Oil Co. (Stone, J.).....	423
Huenkemeier <i>ads.</i> Deke. (Duncan, J.).....	148

I

Illinois Commercial Men's Ass'n <i>ads.</i> Pembleton. (Carter, J.).....	99
Illinois Indemnity Exchange <i>v.</i> Industrial Com. (Carter, J.)..	233
Illinois Surety Co. <i>v.</i> Munro. (Dunn, C. J.).....	570
Indiana Harbor Belt R. R. <i>v.</i> Green. (Stone, J.).....	81
Inglett <i>ads.</i> Threlkeld. (Cartwright, J.).....	90
International Hotel Co. <i>ads.</i> Miles. (Thompson, J.).....	320

J

Jackson <i>v.</i> Kohler. (Dunn, C. J.).....	444
Johnston City <i>v.</i> Chicago & East. Ill. R. R. (Thompson, J.)..	407

	PAGE.
Jones <i>v.</i> Clark County. (Stone, J.).....	535
Jones <i>ads.</i> Rupp. (Duncan, J.).....	596
Joohs <i>ads.</i> Stubbs. (Stone, J.).....	525

K

Kane <i>ads.</i> Farmers' Grain Co. (Dunn, C. J.).....	532
Kellogg <i>ads.</i> Barto. (Cartwright, J.).....	528
Keystone Steel Co. <i>v.</i> Industrial Com. (Cartwright, J.).....	587
King <i>ads.</i> People <i>ex rel.</i> (Duncan, J.).....	462
Kohler <i>ads.</i> Jackson. (Dunn, C. J.).....	444
Kohler <i>ads.</i> People <i>ex rel.</i> (Thompson, J.).....	455
Kraper <i>ads.</i> Pemberton. (Carter, J.).....	295

L

LaSalle Opera House Co. <i>v.</i> Amusement Co. (Dunn, C. J.)..	194
Laures <i>ads.</i> People. (Carter, J.).....	490
LeMorte <i>ads.</i> People. (Carter, J.).....	11
Liberty Foundries Co. <i>v.</i> Industrial Com. (Stone, J.).....	601
Linn <i>v.</i> Campbell. (Thompson, J.).....	347
Lost <i>ads.</i> City of Chicago. (Cartwright, J.).....	605
Lyon & Healy <i>v.</i> Piano Workers' Union. (Dunn, C. J.).....	176

M

Max <i>ads.</i> City of Chicago. (Carter, J.).....	372
McCarthy <i>v.</i> McCarthy. (Farmer, J.).....	365
McCormick <i>v.</i> Bowman. (Carter, J.).....	126
McGinnis <i>v.</i> McGinnis. (Cartwright, J.).....	608
McGrath <i>ads.</i> Keystone Steel Co. (Cartwright, J.).....	587
McHugh <i>ads.</i> City of North Chicago. (Stone, J.).....	121
McKaig <i>v.</i> Appleton. (Farmer, J.).....	301
Mephram & Co. <i>v.</i> Industrial Com. (Thompson, J.).....	484
Metzger <i>v.</i> Emmel. (Thompson, J.).....	52
Meyer <i>ads.</i> People. (Thompson, J.).....	184
Miles <i>v.</i> International Hotel Co. (Thompson, J.).....	320
Mississippi River Power Co. <i>v.</i> Industrial Com. (Dunn, C. J.)	353
Moore <i>ads.</i> Brennan. (Farmer, J.).....	49
Moore <i>v.</i> Downing. (Thompson, J.).....	612
Morrow <i>v.</i> Morrow. (Thompson, J.).....	135

	PAGE.
Mundy <i>ads.</i> Gale. (Farmer, J.).....	142
Munie <i>v.</i> Gruenewald. (Thompson, J.).....	468
Munro <i>ads.</i> Illinois Surety Co. (Dunn, C. J.).....	570

N

North Chicago, City of, <i>v.</i> McHugh. (Stone, J.).....	121
Northern Trust Co. <i>ads.</i> People. (Duncan, J.).....	475

O

PAGE.

Oliver <i>v.</i> Ross. (Thompson, J.).....	624
--	-----

P

Peabody Coal Co. <i>v.</i> Industrial Com. (Carter, J.).....	330
Peabody Coal Co. <i>v.</i> Industrial Com. (Duncan, J.).....	449
Pemberton <i>v.</i> Krapfer. (Carter, J.).....	295
Pembleton <i>v.</i> Illinois Commercial Men's Ass'n. (Carter, J.)..	99
People <i>v.</i> Adams. (Duncan, J.).....	339
People <i>v.</i> Allen. (Cartwright, J.).....	218
People <i>ex rel.</i> <i>v.</i> Barber. (Cartwright, J.).....	556
People <i>v.</i> Binger. (Farmer, J.).....	582
People <i>v.</i> Bransfield. (Stone, J.).....	72
People <i>ex rel.</i> <i>v.</i> Chicago & Alton Ry. (Thompson, J.).....	282
People <i>ex rel.</i> <i>v.</i> Continental Beneficial Ass'n. (Farmer, J.)..	40
People <i>v.</i> Danks. (Thompson, J.).....	542
People <i>v.</i> Dubia. (Cartwright, J.).....	276
People <i>ex rel.</i> <i>v.</i> Ford. (Cartwright, J.).....	550
People <i>v.</i> Geister. (Duncan, J.).....	249
People <i>ex rel.</i> <i>v.</i> Hedges. (Farmer, J.).....	378
People <i>ex rel.</i> <i>v.</i> King. (Duncan, J.).....	462
People <i>ex rel.</i> <i>v.</i> Kohler. (Thompson, J.).....	455
People <i>v.</i> Laures. (Carter, J.).....	490
People <i>v.</i> LeMorte. (Carter, J.).....	11
People <i>v.</i> Meyer. (Thompson, J.).....	184
People <i>v.</i> Northern Trust Co. (Duncan, J.).....	475
People <i>v.</i> Stoneking. (Thompson, J.).....	308
People <i>ex rel.</i> <i>v.</i> Swanson. (Dunn, C. J.).....	335
People <i>ex rel.</i> <i>v.</i> Wiley. (Cartwright, J.).....	173
Piano Workers' Union <i>ads.</i> Lyon & Healy. (Dunn, C. J.)....	176

PAGE.

Polish Manual Training School <i>v.</i> Cook County. (Duncan, J.)	432
Poole <i>ads.</i> Diamond Livery. (Thompson, J.)	591
Pratt <i>v.</i> Skiff. (Duncan, J.)	268
Purvis <i>v.</i> Big Muddy Coal and Iron Co. (Stone, J.)	515
Pyle-National Elec. Headlight Co. <i>ads.</i> Farwell. (Dunn, C. J.)	157

R

Rainford <i>v.</i> Chicago City Ry. (Cartwright, J.)	427
Ross <i>ads.</i> Oliver. (Thompson, J.)	624
Royal Indemnity Co. <i>ads.</i> Wilce Co. (Farmer, J.)	383
Rupp <i>v.</i> Jones. (Duncan, J.)	596

S

Sabatini <i>ads.</i> Spring Valley Coal Co. (Cartwright, J.)	315
Schmidt <i>v.</i> Glos. (Dunn, C. J.)	576
Schwill <i>ads.</i> Wolf. (Cartwright, J.)	190
Spring Valley Coal Co. <i>v.</i> Industrial Com. (Cartwright, J.)	315
Springer <i>ads.</i> Emmel. (Thompson, J.)	52
Stephens <i>v.</i> Mephram & Co. (Thompson, J.)	484
St. Hedwig's Industrial School <i>v.</i> Cook County. (Duncan, J.)	432
Stoneking <i>ads.</i> People. (Thompson, J.)	308
Stubbs <i>v.</i> Industrial Com. (Stone, J.)	525
Svenson <i>v.</i> Hanson. (Thompson, J.)	242
Swanson <i>ads.</i> People <i>ex rel.</i> (Dunn, C. J.)	335

T

Tallerday <i>ads.</i> Flemming. (Farmer, J.)	508
Threlkeld <i>v.</i> Inglett. (Cartwright, J.)	90
Trustees of Eureka College <i>v.</i> Bondurant. (Farmer, J.)	289
Tumy <i>v.</i> Mayer. (Cartwright, J.)	458

W

Washingtonian Home <i>ads.</i> City of Chicago. (Stone, J.)	206
Weber <i>v.</i> Brak. (Stone, J.)	564
Wilce Co. <i>v.</i> Royal Indemnity Co. (Farmer, J.)	383
Wiley <i>ads.</i> People <i>ex rel.</i> (Cartwright, J.)	173
Witt <i>ads.</i> City of Chicago. (Carter, J.)	520
Wolf <i>v.</i> Schwill. (Cartwright, J.)	190
Woman's Board of Missions <i>v.</i> Pratt. (Duncan, J.)	268
Woodworth <i>v.</i> Beck & Co. (Farmer, J.)	579

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF ILLINOIS.

(No. 12579.—Judgment affirmed.)

**THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. ROCCO LEMORTE, Plaintiff in Error.**

Opinion filed June 18, 1919—Rehearing denied October 9, 1919.

1. **CRIMINAL LAW**—*court is justified in reprimanding counsel who makes many frivolous objections.* The court, in a criminal case, is justified in speaking sharply to the defendant's counsel who continually makes frivolous objections, and its action in so doing and in overruling such objections is not ground for reversal as showing prejudice of the court against the defendant.

2. **SAME**—*jury may be instructed to use their best judgment as reasonable men in weighing evidence.* It is proper to instruct the jury that they have no right to disbelieve as jurors if from the evidence they believe as men, and they may be instructed to take into consideration, in weighing the evidence, their "own common knowledge and observation in the affairs of life."

3. **SAME**—*instruction should not be worded to encourage jury to disagree.* An instruction stating, in substance, that no juror should consent to a verdict which does not meet with the approval of his conscience, after due deliberation with his fellow jurors and fully considering the evidence and the instructions, tends to encourage a disagreement of the jury and is properly refused.

4. **SAME**—*judgment of conviction cannot be reversed because counsel for defendant failed to exercise skill.* A court of review

cannot reverse a judgment of conviction in a criminal case because the counsel for the accused made a serious blunder at the trial or failed to exercise the greatest skill.

5. SAME—*counsel should state facts showing necessity for continuance of hearing of motion for new trial.* Where for any good reason the accused is justified in changing his counsel after the verdict the new counsel should be given time in which to prepare matters to be presented on motion for new trial, but in asking for a continuance of the hearing of the motion, facts should be stated showing necessity for delay and that the interests of justice require a continuance.

6. SAME—*court exercises discretion in delaying hearing of motion for new trial.* Whether new counsel for the accused shall be granted a continuance in which to prepare matters to be presented on motion for a new trial rests in the discretion of the trial judge, and unless there is a clear abuse of discretion tending to an improper conviction, a denial of the motion for continuance is not ground for a reversal of the judgment.

7. SAME—*newly discovered evidence must be conclusive to justify new trial.* Applications for new trial on the ground of newly discovered evidence are not looked upon with favor by the courts, and to justify the granting of a new trial the newly discovered evidence must be conclusive and not merely cumulative, nor of such a nature that its truth may be conceded without justifying an acquittal in the face of other evidence.

8. SAME—*courts are not required to rely on affidavits on motion for new trial.* Courts are not required to believe an unreasonable story, even though it is not contradicted, merely because it has been sworn to by a witness on the trial of the case, and they are not required to rely on or to believe *ex parte* affidavits on a motion for new trial.

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. KICKHAM SCANLAN, Judge, presiding.

DEStEFANO & MIRABELLA, (CHARLES HUGHES, and
ROCCO DEStEFANO, of counsel,) for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, MACLAY
HOYNE, State's Attorney, and JAMES B. SEARCY, (EDWARD
E. WILSON, and HAYDEN N. BELL, of counsel,) for the
People.

Mr. JUSTICE CARTER delivered the opinion of the court:

Plaintiff in error was indicted at the December term, 1917, of the criminal court of Cook county for the murder of Martin Pina. At his trial before a jury in February, 1918, he was found guilty and his punishment was fixed at imprisonment in the penitentiary for fifteen years and judgment was entered on that verdict. This writ of error has been sued out to review those proceedings.

In July, 1917, John Rosol kept a saloon on State street, in Blue Island, in Cook county, and in connection with it he ran a dance hall and pool room. The saloon and dance hall were located on the first floor in a two-story building, the pool room being between them. The second floor of the building was occupied by Rosol and his family as a residence. On Saturday evening, July 14, 1917, in the street in front of this saloon, Martin Pina, a Mexican, was shot and killed. The evidence tends to show that dances had been conducted in this hall on several previous Saturdays; that they were carried on from early in the evening until midnight, and such a dance was being conducted on the evening of July 14; that between fifty and seventy-five persons, mostly Mexicans and Italians, were in the saloon, pool room and dance hall that night. The evidence tends to show that the saloon was closed a few minutes before twelve o'clock. Shortly after it was closed five revolver shots were fired in quick succession, after which Pina was found lying dead on the sidewalk in front of the saloon. Marie Kujowski was employed as a housemaid by Rosol, the proprietor. She had been keeping company with Stanley Groszwicz and he was visiting her that evening. She testified that she saw the plaintiff in error dancing in the hall during the Saturday evening of July 14; that she was quite well acquainted with him and had seen him at various times during the last few months; that his aunt lived next door; that she saw him come into the saloon from the dance hall just a few minutes before the saloon

closed, in company with another Italian, Gugliemucci; that after the saloon closed she and Groszwicz started to go up-stairs, when they heard a bottle crash on the sidewalk. They hurried to the front window up-stairs and she saw a crowd of Mexicans in one group and a crowd of Italians in another in front of the saloon; that plaintiff in error was with the Italians and stood three or four feet in front of them; that she became frightened and turned her eyes away and then heard the shots fired; that when she looked back she saw Pina lying on the sidewalk and two Mexicans standing by him and the Italians running away through the yard; that when she first saw the Mexicans and Italians they were about fifteen feet apart, about a dozen men in each group.

Stanley Groszwicz testified that he reached the saloon that night about seven o'clock and remained there and in the dance hall until it closed; that he was well acquainted with plaintiff in error and had known him for three years; that he saw him that evening first at about 7:30 o'clock in the saloon; that he also saw him in the saloon before it closed; that there were twelve or fourteen Italians with him. His story agreed substantially with the testimony of the maid, Marie. He testified to hearing the bottle smash when they were on their way up-stairs, and that when they reached the window and looked out he saw the group of Italians and group of Mexicans walking toward each other. He also testified that he saw plaintiff in error in front of the Italians with a revolver in his hand; that he saw him when he fired the five shots toward the Mexicans, and that Pina immediately fell to the sidewalk and the Italians ran away; that he and Marie ran down-stairs and got some water and went out to the man lying on the sidewalk; that he wrote the name of plaintiff in error, Rocco LeMorte, on paper and gave it to the police two weeks after the shooting; that he did not give the information sooner because he was afraid of the Italians. He testified positively that

the man who fired the shots was plaintiff in error, and that at the time of the shooting he was farthest in front of the group of Italians and nearest the Mexicans. It appears that after this witness had testified at the inquest he was talked to by some of the Italian friends of plaintiff in error, and one of them, a witness in this case, Mike LeMorte, said to him, in effect, as did others, "Try your best to get Rocco out of this trouble; he is a good fellow;" that in fear of his life he told some of them that he had not testified to the truth at the preliminary hearing; that shortly after they talked to him he met a crowd of Italians whose appearance aroused his fears, and he called up the police and a patrol wagon was sent to take him home.

Charles Schwartz was a special police officer detailed for the dance hall on the evening in question and was there during the evening and at the time of the shooting. He testified that there were two arc lights in the street near the saloon on the night in question which lit up the space quite clearly, and that a person looking through the window of Rosol's residence, as Marie and Groszwicz testified they looked, could plainly see the surroundings in front of the saloon and the people near by.

Two Italian girls, fifteen or sixteen years of age, who lived near the saloon in question, testified they were well acquainted with the plaintiff in error; that they were at the dance hall that evening and did not see him there at any time during the evening, although they had seen him there at other times and had danced with him. Several other witnesses testified that they were at the dance hall during the evening and did not see plaintiff in error there.

There was testimony on behalf of plaintiff in error by Tony Capiello, Joe Capiello, Anna Capiello and Mike LeMorte that on the night of the shooting plaintiff in error stayed all night at Tony Capiello's house, located some three miles distant from the saloon. Plaintiff in error had recently married. The Capiellos swore that he was there

during the entire evening of Saturday, July 14, and some of them testified that he and his wife remained there all night and were there the next forenoon. It appears from the evidence that plaintiff in error and his wife had never stayed with the Capiellos at any other time, and it is argued by counsel for the State that their story is unreasonable in thinking that the wife on such short acquaintance,—since July 4 of that year,—would visit the Capiellos and remain all night. Counsel for the State also question the story of some of these witnesses that they remembered the time when plaintiff in error's wife was there, because one of them, at least, talked about it a day or two after the shooting with a friend of plaintiff in error and his lawyer. They argue that this is unreasonable, because there had been no public charges made against plaintiff in error as to the shooting until some time thereafter, and that nobody was charging him with being in any way connected with the shooting until after Groszwicz, at least two weeks after the shooting, gave his name to the police. Counsel for plaintiff in error, on the other hand, argue that the story of Marie and Groszwicz, whose testimony was practically the only evidence in the record that connected plaintiff in error directly with the shooting, is unreliable because it is too nearly identical, one with the other, in all particulars, and in an affidavit in support of the motion for new trial the attorney for plaintiff in error stated that such testimony was concocted by Rosol and that these two witnesses perjured themselves at Rosol's suggestion.

Counsel for plaintiff in error first argue that error was committed by the trial judge with reference to his actions in the examination of witnesses during the hearing and by his statements and actions showing that he was prejudiced against plaintiff in error during the trial. The examination of some of the witnesses was long and tedious, some of them not understanding English very well, but we find nothing in the examination of any of these witnesses or in the

part that the trial judge took with reference to such examination or in his rulings on the evidence that would lead the jury to believe that he was prejudiced against plaintiff in error. It is true that he ruled repeatedly contrary to the contention of counsel for plaintiff in error, but it is also true that this counsel made frivolous objections, and at one time stated that he made the objection just because he wanted to object. If the judge, because of his actions in this regard, spoke sharply to him he was justified in so doing. We find nothing in the record that justifies the criticism of counsel for plaintiff in error as to the court's action in taking part in the examination being prejudicial to plaintiff in error, even if, as argued, such action be considered in the light of the reasoning of this court in *People v. Lurie*, 276 Ill. 630, and *O'Shea v. People*, 218 id. 352.

Counsel for plaintiff in error object to several instructions given on behalf of the State, among others instruction 10, on the ground that it did not confine the jury to the consideration of the evidence in the record. We do not think the instruction in question was misleading in this regard.

Counsel also object to instruction 11 given for the State, on the ground, as we understand it, that it would lead the jury to believe they had a right to disregard the testimony of any witness on all points if they believed such witness to have sworn falsely on any one of the material issues in the case, except in so far as such witness was corroborated by other competent evidence or circumstances in the case. There can be no question that even though a witness might swear falsely as to one material point in regard to other facts he might be corroborated by the testimony of other witnesses, and that in such case the jury might not be justified in discarding his whole testimony. (*Peak v. People*, 76 Ill. 289.) We do not think the wording of instruction 11 would tend to lead the jury to think otherwise.

Counsel for plaintiff in error also argue that the court erred in modifying instruction 13 offered on his behalf as to the jury being the judges of the credibility of the witnesses, by adding to the instruction as offered this provision: "You are the sole judges of the credibility of the witnesses in this case, and the credit to be given to each is to be determined by you from considering the probability or improbability of either statements, their means or want of means of knowledge of facts to which they testify, the opportunity of the several witnesses seeing or knowing the things about which they testify; and in passing upon any evidence in the case you have the right to take into consideration your own common knowledge and observation in the affairs of life." The wording of the modification which states that they had a right to take into consideration their "own common knowledge and observation in the affairs of life" is especially criticised, in that it might have been injurious in this case because the chief witnesses supporting the theory of the State were of Polish extraction while the plaintiff in error and most of the witnesses who testified for him were Italians, and that this wording might have led them to disregard the testimony of the Italians. We cannot see how it can be argued that this instruction could have that effect any more than it might have led the jury to disregard the testimony of the Polish witnesses. This court has more than once ruled that it was proper for the jury to be instructed that they had no right to disbelieve as jurors if from the evidence they believed as men. (*People v. Zajicek*, 233 Ill. 198, and cases cited; see, also, *Haris v. Shebek*, 151 Ill. 287, and *State v. Elsham*, 70 Iowa, 531.) This modification of the instruction merely stated that the jury ought to take into consideration, in considering the evidence, the same things that they would take into consideration in deciding upon the common affairs of life, and that they were to use their best judgment as reasonable men as they would in considering the common, every-

day-affairs of life. There was no error in thus modifying the instruction in question. Indeed, counsel for plaintiff in error seem somewhat inconsistent in their argument on this question, because they argue that the trial court erred in refusing instruction 25 offered on behalf of plaintiff in error, which, in substance, practically asked the court to instruct the jury that they should be governed, in reaching a conclusion, by their common observation and experience concerning ordinary affairs.

Counsel for plaintiff in error further argue that the court erred in refusing to give their 27th instruction asked, which reads:

"The court instructs you that no juror should consent to a verdict which does not meet with the approval of his own judgment and conscience after due deliberation with his fellow-jurors and fully considering all the evidence in this case and the law as given in the instructions of the court."

The wording of the instruction as offered would tend to encourage a disagreement of the jury, and it has been more than once stated by this court that an instruction of that character should be refused. *People v. Lee*, 237 Ill. 272; *Addison v. People*, 193 id. 405.

Counsel for plaintiff in error further argue that the court erred in failing to give to the jury, on its own motion, an instruction as to manslaughter. The record shows that counsel for plaintiff in error during the trial stated to the court that in view of the defense made on his behalf plaintiff in error was guilty of either murder or nothing and that the defense wished no instruction nor form of verdict on manslaughter. The counsel who appear in this court did not represent plaintiff in error in the trial before the jury, and they now contend that notwithstanding the then counsel did not wish any instruction as to manslaughter, it was the duty of the court, on the record, to give such instruction to the jury. We cannot so hold. This court

has held that a court of review cannot reverse a judgment of conviction in a criminal case where, in looking backward over the trial, it might conclude that the accused's counsel had made some serious blunder; that the judgment will not be reversed for failure of plaintiff's counsel to exercise the greatest skill. *People v. Barnes*, 270 Ill. 574; see, also, *People v. Anderson*, 239 Ill. 168; *People v. Nall*, 242 id. 284; *People v. Thomas*, 272 id. 558.

Shortly after the verdict of the jury on February 13, 1918, the attorney for plaintiff in error who tried his case before the jury withdrew his appearance and one of the present counsel entered his appearance as substitute for the plaintiff in error and filed an affidavit in the trial court setting up reasons why the motion for a new trial should be continued in order to allow the substituted counsel time in which to prepare and present his reasons for the motion for new trial being allowed. This motion for an extension of time and continuance was denied and the court proceeded at once to hear and dispose of the motion for new trial. Most of the matters set up in the affidavit asking for a continuance were stated to be based upon the information and belief of the affiant, and particularly charged that the testimony of Marie Kujowski and Stanley Groszwicz was perjured and that their testimony had been procured by the efforts of John Rosol, the proprietor of the saloon. There can be no doubt that in furtherance of justice, when for any good reason the accused is justified in changing his counsel after the verdict of the jury, his new counsel should be given a reasonable time in which to prepare matters to be presented on motion for new trial, but delay is not required simply to give counsel an opportunity to scour the country to see if by any possibility something may not be found tending to disprove some matter given in evidence on the trial. Facts should be stated, in asking for a continuance to prepare for the hearing on the motion for new trial, showing necessity for delay, and that there is a substan-

tial reason, in the interest of justice, requiring it. In many cases a few hours' delay would be manifestly sufficient to enable counsel to prepare for making and arguing the motion for a new trial, while in other cases it is possible that by reason of peculiar circumstances it might require days. Without a clear abuse of the trial court's discretion in this regard, manifestly tending to an improper conviction, there should be no reversal on this ground. (*Bulliner v. People*, 95 Ill. 394.) The question is one which rests in the sound discretion of the trial judge, who is much more familiar with the record and the circumstances connected with the trial and what time is necessary to prepare and present the reasons than this court can possibly be. We cannot say that the trial judge abused his discretion in this regard in this case.

After the above motion was overruled on February 16, 1918, a motion was made February 23 to vacate the sentence, and this motion was supported by the affidavits of Ralph Zolfo, Louis Sinise and Michele Manduzio. These three affidavits in substance stated that affiants were well acquainted with plaintiff in error; that they also were well acquainted with another person named Rocco LeMorte, (the same name as that of plaintiff in error,) and that they saw this other Rocco LeMorte on Saturday night, July 14, in front of Rosol's saloon fire the shots at the crowd of Mexicans who were with Pina at the time he was shot; that plaintiff in error did not fire these shots and that they did not see him in the street with the crowd of Italians at the time of the shooting; that they had not said anything about this before because of fear of consequences to themselves if they so testified. It is most earnestly argued by counsel for plaintiff in error that the trial court erred in not allowing this motion, based on these affidavits, to set aside the judgment entered in the trial court and to allow a new trial. Applications for new trial on the ground of newly discovered evidence are not looked upon with favor

by the courts, "and in order to prevent, so far as possible, fraud and imposition which defeated parties may be tempted to practice as a last resort to escape the consequence of an adverse verdict, such applications should always be subjected to the closest scrutiny by the court, and the burden is upon the applicant to rebut the presumption that the verdict is correct and that there has been no lack of due diligence. The matter is largely discretionary with the trial court, and the exercise of its discretion will not be disturbed except in a case of manifest abuse." (20 R. C. L. 289.) In *People v. Williams*, 242 Ill. 197, this court had occasion to consider what was necessary to be shown in order to justify a new trial on the ground of newly discovered evidence and stated that the evidence must be such as will probably change the result if a new trial is granted; that it must have been discovered since the trial and be such as could not have been discovered before the trial by the exercise of due diligence; that it must be material to the issues and must not be merely cumulative to the evidence offered on the trial. These same requirements are substantially set forth in Wharton's Criminal Pleading and Practice. (8th ed. sec. 866.) It has been frequently stated by this court that newly discovered evidence, on motion for new trial, must be clearly conclusive in its character to require the court to grant a new trial. (*Henry v. People*, 198 Ill. 162, and cases there cited.) Counsel for plaintiff in error, at the time of submitting these affidavits that a different person of the same name as plaintiff in error had fired the shots that killed Pina, did not file any affidavit that he had used due diligence or that the evidence was newly discovered as far as he was concerned, although in his affidavit for a continuance a few days before, he did in a general way state that he believed that he had ascertained that there were two persons named Rocco LeMorte living in Blue Island, not related to each other, and that one different from plaintiff in error was the one who fired

the fatal shots, and that he had used all diligence possible to ascertain the facts since he had been employed. There is nothing in the affidavits that states that the former attorney who tried the case before the jury had used diligence to ascertain this evidence or that he did not know of it at the time of the trial. The affidavits of these three witnesses are certainly, in some respects, extraordinary. All three of them swore that they had known the plaintiff in error for years. One of them said affiant had known him since he was a boy and had attended his wedding. Some of them apparently knew of his being bound over to the grand jury, indicted and tried for this offense. All of them, according to their affidavits, were present when the shooting occurred. It seems a very poor excuse for credible witnesses, under such circumstances, to keep silent until after their friend and acquaintance was convicted of the crime of murder because of the fear that they would be caused trouble by testifying publicly to what they knew. If they were present among the crowd at the dance and with the group of Italians, one of whom did this shooting, some of the people there must have known they were present, and by the exercise of reasonable diligence it seems manifest that someone must have talked with them as to what they knew about the circumstances. Under the circumstances here appearing on this record, these affidavits as to newly discovered evidence come obviously within the rule just quoted, that they should be subjected to the closest scrutiny in order that the court might not be misled by parties who might be attempting to practice fraud or imposition upon the court in order to escape the consequences of an adverse verdict. As already stated, a new trial will not be granted on account of the discovery of facts and circumstances merely cumulative in their character. The reason of the rule is that public policy, looking to the finality of trials, requires that parties be held to diligence in preparing their cases for trial. This rule, when properly applied, is a salutary guide to the

discretion of the court, and where the testimony is strictly cumulative and merely increases the weight of the evidence, leaving the cause still in doubt, or where it is of such a nature that its truth may be conceded without justifying acquittal in the face of other evidence, a new trial will not be granted. (20 R. C. L. 295, 296.) Courts are not required to believe an unreasonable story even though it is not contradicted, merely because it has been sworn to by a witness on the trial of the case. (*People v. Davis*, 269 Ill. 256; *Stephens v. Hoffman*, 275 id. 497.) This rule applies with equal, if not greater, force as to relying on and believing *ex parte* affidavits on a motion for new trial. We cannot say on this record that it was affirmatively shown that due diligence had been used by plaintiff in error or his counsel to ascertain whether such evidence existed before the trial, neither can we feel assured that if such evidence had been procured and presented to the jury a different result would have been reached by the jury.

It is also argued by counsel that the evidence does not justify the verdict; that the verdict is contrary to the weight of the evidence. Whether the evidence warranted the verdict was a question of fact peculiarly for the jury to determine, and great weight is to be given to their finding. Courts are reluctant to substitute their opinion for that of the jury upon controverted questions of fact, and it is only when this court is able to say, from a careful consideration of the whole of the testimony, that there is clearly a reasonable and well founded doubt of the guilt of the accused, that it will interfere on the ground that the evidence does not support the verdict. (*Steffy v. People*, 130 Ill. 98; *Lathrop v. People*, 197 id. 169.) We are unable to say from an examination of this record that the verdict in the case at bar is manifestly erroneous or that the finding of the jury is obviously contrary to the decided weight of the testimony.

The judgment of the criminal court will be affirmed.

Judgment affirmed.

(No. 12577.—Appellate Court reversed; circuit court affirmed.)
WILLIAM FELDMAN, Plaintiff in Error, vs. THE CHICAGO
RAILWAYS COMPANY *et al.* Defendants in Error.

Opinion filed June 18, 1919—Rehearing denied October 9, 1919.

1. NEGLIGENCE—the relation of carrier and passenger continues while passenger on street railway makes transfer. Where a passenger who is making a continuous journey on a street railway alights from a car for the purpose of making a transfer the relation of carrier and passenger continues while he is in the necessary act of making said transfer, and if he is injured through the negligence of the carrier while making the transfer the carrier is liable.

2. SAME—one who has alighted from street car at end of journey ceases to be a passenger. Where a passenger alights into the public street from a street car at the end of his journey he ceases to be a passenger.

3. SAME—degree of care street car company must exercise over passenger making transfer. The fact that the carrier would not be liable for an injury caused by a third person to a passenger making a transfer from one of the carrier's cars to another in a public street, where the carrier can exercise no control over his movements, does not change the relation of carrier and passenger during the transfer, and the carrier is bound to use the highest degree of care to avoid injury to the passenger through the negligence of its own servants or agencies while he is engaged in the necessary act of such transfer.

4. SAME—statement of the doctrine of *res ipsa loquitur*. Where a thing which has caused an injury is shown to be under the management of the party charged with negligence and the accident is such as in the ordinary course of events will not happen if those who have the management use proper care, the accident itself affords reasonable evidence and constitutes a *prima facie* case of negligence, and the burden rests upon the defendant to overcome the presumption of negligence arising from the facts of the case.

5. SAME—when the doctrine of *res ipsa loquitur* may be applied. The allegations of negligence in a declaration by a plaintiff who was struck by a street car are sufficiently general to permit the application of the doctrine of *res ipsa loquitur* where they charge that the defendant so carelessly, negligently and improperly managed and operated the car that by reason thereof the car left the track and struck and collided with the plaintiff without fault or negligence on his part.

CARTWRIGHT, J., and DUNN, C. J., dissenting.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding.

STEIN, MAYER & STEIN, (SIGMUND W. DAVID, of counsel,) for plaintiff in error.

HARRY P. WEBER, GEORGE W. MILLER, and ARTHUR J. DONOVAN, (JOHN R. GUILLIAMS, and FRANKLIN B. HUSSEY, of counsel,) for defendants in error.

Mr. JUSTICE STONE delivered the opinion of the court:

This cause comes to this court by *certiorari* to the Appellate Court for the First District, which court heard the cause on appeal and reversed the judgment of the circuit court of Cook county without remanding the cause.

The declaration filed consisted of four counts. The first count alleged that on February 26, 1915, the defendants, the Chicago Railways Company and others, were then and there the owners of and in possession, control and management of divers lines of street railways in Chicago, and had in their possession, use, control and management, for the purpose of operating the street railways, certain cars, machinery, power houses, tracks, switches and other devices and instrumentalities, and were engaged in the business of common carriers of passengers for hire; that on said date, at a point on the line of the street railway owned by the defendants on Cicero avenue, to-wit, at Harrison street, the plaintiff boarded one of the cars, paid his fare and received a transfer coupon for transfer at the intersection of Cicero avenue and Twelfth street; that by reason of the premises it then and there became the duty of defendants to use the highest degree of care to carry safely plaintiff in their cars to his place of destination and there deliver him uninjured,

and to that end and for that purpose to exercise and use the highest degree of care and caution in the control, operation, management and state of repair of their cars, wheels, tracks, brakes, trucks and switches, but therein the defendants wholly failed; that after the car in which plaintiff had been riding as a passenger arrived at the intersection of Twelfth street and Cicero avenue, and while he was proceeding as such passenger from said car to the proper place near the southwest corner of Twelfth street and Cicero avenue, there to wait for a car east-bound on Twelfth street to proceed on his journey, and while he was in the exercise of due care and caution for his own safety and without fault or negligence on his part, he was struck by, run into and over by the defendants, who then and there so carelessly, negligently and improperly managed and operated said electric car that by reason thereof the car then and there left the track and struck and collided with and ran with great force and violence into and upon the plaintiff, whereby he was then and there thrown with great force and violence upon the ground and was thereby greatly bruised, etc. Following the foregoing are allegations of injuries and damage.

The second count, after alleging ownership and control as in the first count and the duty of the defendants to exercise due care and caution in operating their cars so as not to collide with or run into pedestrians then and there rightfully upon the public highway, charges that while the plaintiff was then and there standing upon and walking on Cicero avenue, going in a southeasterly direction at the intersection of said street with Twelfth street, in the public highway in Chicago, and while he was then and there in exercise of ordinary care and caution for his own safety, the defendants, through their servants in charge of one of said cars, so carelessly, negligently and improperly managed and operated the electric car that by reason thereof said

car then and there struck, collided with and ran with great force and violence against and upon the plaintiff, etc.

The third count alleges ownership, etc., as set forth in the first count, and that it was the duty of the defendants to keep said car and all the parts thereof, including the wheels, trucks, brakes and trolleys, in good and safe repair and condition, and to operate said car, and all parts thereof, with due skill, care and caution for the safety of others, yet defendants carelessly and negligently failed to keep said car in repair, so that the same did not work properly, and the defendants then and there so negligently, carelessly and improperly operated said car that by reason thereof and by reason of the premises the car collided with plaintiff.

The fourth count charges a defective track and that the switches and tracks were out of repair, and that by reason of the negligence of defendants in not keeping the same in repair, and the careless operation of the car, the plaintiff was injured.

To the four counts of the declaration the defendants in error filed the general issue, to which a replication was filed by the plaintiff in error.

It is conceded and admitted by the plaintiff in error and the defendants in error that there is no contradiction in the testimony relative to the facts and circumstances surrounding the happening of the accident in question. On the morning of the accident the plaintiff in error took the south-bound car of defendants in error on Cicero avenue, entering the same at Harrison street. His journey was to Douglas boulevard and Turner avenue, which necessitated his transfer to another car of defendants in error going east, at the corner of Twelfth street and Cicero avenue. Upon boarding the car he paid his fare and called for and received from the conductor in charge a transfer which would entitle him to a continuous ride by transferring at Twelfth street and Cicero avenue to Douglas boulevard and Turner avenue. The car upon which he was riding came

to a complete stop upon the north side of Twelfth street. At this point the north and south-bound tracks of defendants in error on Cicero avenue intersected their east and west tracks on Twelfth street. A switch extended from the west side of the south-bound track on Cicero avenue to the north side of the west-bound track on Twelfth street, connecting said tracks. The front trucks of the car passed south over the switch before the car stopped. The plaintiff in error thereupon left the car, alighting at the rear end thereof, and started toward the southwest corner of the intersection, which was the usual and customary place for passengers to wait for cars going east, one of which cars would take him to his journey's end. When he reached a point five or six feet west of the car and in the neighborhood of the north curb or crosswalk of Twelfth street the car from which he had alighted was started by the motor-man, but instead of going south the rear end of the car suddenly swung around to the west, completely out of its course of travel, so that the end of the car almost touched the west curb of Cicero avenue, striking plaintiff in error and knocking him down. It is apparent from the evidence that after the front trucks had passed over the switch, for some reason not found in the evidence the switch had changed its position so as to guide the rear trucks onto the switch in a southwesterly direction, thereby throwing the car around, as above described, to such an extent that at the time of the injury to the plaintiff in error the car was in a position extending almost east and west. The plaintiff in error was removed to a hospital, where an examination disclosed a fracture of the clavicle or collar bone into three parts, one part of which (a little triangular piece) was directed downward and entirely out of line of the fractured ends. After being operated upon it was found that the plaintiff in error had developed an enlargement of the artery extending from the heart into the region of the collar bone.

The jury returned a verdict for the plaintiff in error in the sum of \$5500. Motions for new trial and in arrest of judgment were overruled and an appeal was prayed and perfected to the Appellate Court for the First District by the defendants in error. The Appellate Court held as a matter of law that the plaintiff in error at the time of the accident was not a passenger of the defendants in error; that when the plaintiff in error alighted from the Cicero avenue car upon which he had been traveling the relation of passenger and carrier ceased. That court also held that the doctrine of *res ipsa loquitur* was not applicable under the pleadings in this case; that each count of the declaration alleged negligence in special and not in general terms; that the plaintiff in error had failed to support his cause of action with evidence of special negligence, as charged in the declaration; that the evidence in the record is not sufficient to support the third and fourth counts of the declaration. For those reasons the judgment was reversed and the cause remanded by the Appellate Court. The plaintiff in error thereupon stated by affidavit that he had relied upon the doctrine of *res ipsa loquitur* and would be unable to produce further evidence of special negligence upon the second trial. Thereupon the Appellate Court, upon motion, changed its original judgment, reversed the case without remanding and gave judgment of *nil capiat* in favor of the defendants in error, from which judgment the cause is brought to this court on writ of *certiorari*.

It is contended by the plaintiff in error that the judgment of the trial court was correct and should have been affirmed; that the plaintiff in error was at the time of the accident a passenger of the defendants in error; that if he was not such a passenger, such fact affects only the degree of care which it was the duty of defendants in error to exercise toward the plaintiff in error; that the pleadings and the facts in evidence bring this case within the doctrine of *res ipsa loquitur* under the first and second counts

of the declaration. It is contended by defendants in error that plaintiff in error was not a passenger at the time of the accident; that the doctrine of *res ipsa loquitur* cannot be invoked under the pleadings in this case; that the trial court committed reversible error by submitting the cause to the jury on the second, third and fourth counts of the declaration. Errors were also assigned on the ruling of the trial court as to instructions and admission of evidence.

The principal questions involved in this case are: First, was plaintiff in error a passenger at the time of the injury? If he was, defendants in error owed him the highest degree of care. If, on the other hand, he was not but was a pedestrian, defendants in error owed him but ordinary care. Second, does the doctrine of *res ipsa loquitur* apply in this case? It is not contended that that doctrine applies under the pleadings of the third and fourth counts, nor is it contended by plaintiff in error that the special negligence charged in the third and fourth counts has been sustained by the proof, therefore that question will be considered with its relation to the first and second counts of the declaration.

As we have seen, the first count charges that plaintiff in error was a passenger. While the decisions of the courts of the various States have not been uniform as to this rule, it has been before this court in earlier cases. In *Chicago City Railway Co. v. Carroll*, 206 Ill. 318, the appellee, Carroll, was a passenger on a street car of appellant. He took the car at Sixty-third street and Wentworth avenue and rode to Thirty-fifth street, where appellant had a line crossing the line on which appellee was riding. Appellee, upon reaching Thirty-fifth street, alighted from the Wentworth avenue car to go to the Thirty-fifth street car. The trolley pole from the Wentworth car, from which he had just alighted or was alighting, fell and struck him on the head and knocked him down. This court held that the appellee was a passenger on both lines of appellant while making a continuous journey to his destination. It is urged

that the court there based its decision on other grounds and that the only reference to the relation of carrier and passenger was incidental and not necessary to the decision; also that the court's treatment of the subject of the relation of carrier and passenger was based on the evidence in that case that appellee was just alighting from the car. A reading of the opinion in that case discloses that these contentions cannot be sustained. While there were other features in the case and while the relation of the parties was not discussed at length, the court in its opinion makes no distinction between circumstances where the person claiming to be a passenger is alighting or has alighted from the car, but holds that by reason of the fact that appellee was on a continuous journey the relation of carrier and passenger existed. Nor is it true that such holding was not necessary to the determination of the case. Instructions were given in that case based on the theory that appellee was a passenger, and the opinion sustains those instructions. We think it clear from the decision in that case that the doctrine is there laid down that where a passenger, in pursuance of a continuous journey, transfers from one car to another under circumstances such as shown in this record, the relation of carrier and passenger continues throughout the necessary acts of such transfer. To the same effect is *North Chicago Street Railroad Co. v. Kaspers*, 186 Ill. 246. In that case the appellee had alighted from one street car, had crossed over the street and was in the act of taking another car to which he was to transfer, when the same started up and threw him to the ground. It was there held that he was a passenger. In *Chicago and Alton Railroad Co. v. Winters*, 175 Ill. 293, the appellee was a passenger on a stock train. When that train stopped at one of its stations appellee was obliged to alight from the caboose in which he was riding in order to get into another caboose which was to be attached to a new train more than a block north of the point where the train on which he was riding had

stopped. When he alighted and was on his way to a lunch counter to get lunch and thereafter to take the other caboose he was struck by another train and injured. It does not appear that he was walking upon a platform or any part of the appellant's premises provided for passengers to alight from trains, but it was nevertheless held that the relation of carrier and passenger continued.

While the holdings of the courts of this country have not been uniform upon this question, notably those of Massachusetts and Tennessee holding that the relation of carrier and passenger ceases where one alights from a car in a public street for the purpose of transfer, (*Creamer v. West End Railway Co.* 166 Mass. 320; *Chattanooga Railway Co. v. Boddy*, 105 Tenn. 666;) we are of the opinion that the weight of authority in this country sustains the view that where, as here, a passenger who is making a continuous journey alights from a street car for the purpose of making a transfer, the relation of carrier and passenger continues while he is in the necessary act of making said transfer, and that if he be injured through the negligence of the carrier while making such transfer the carrier is liable. *Keator v. Scranton Traction Co.* 191 Pa. St. 102; *Wilson v. United Railway Co.* 167 Mich. 107; *Colorado Springs and Canon City Railway Co. v. Pettit*, 37 Colo. 326; *Whilt v. Public Service Corp.* 76 N. J. L. 729; 10 Corpus Juris, 630.

It is urged by defendants in error that plaintiff in error was no more a passenger than was another man named Burke, who had alighted from the front end of the car and was injured at the same time. This contention, however, overlooks the fact, as appears from the record, that Burke had finished his journey and had left the car. There is no doubt, under all the authorities, that where a passenger alights into the public street from a street car at the end of his journey he ceases to be a passenger. The distinction between Burke and plaintiff in error lies in the fact that the plaintiff in error was engaged in a continuous journey,

while Burke's journey, so far as the carrier was concerned, had ended. As was held in *Chicago City Railway Co. v. Carroll, supra*, the ticket of transfer itself was not what established the relation of carrier and passenger, but was merely the evidence of the fact that plaintiff in error was engaged in a continuous journey. This fact affords the test whether or not plaintiff in error was a passenger, and while it is true that during such transfer the carrier could exercise no control over the movements of the passenger, so as to render the carrier liable in case of injury received from some other source than the carrier, still that fact does not change the relation of carrier and passenger in the case of such transfer, nor lessen the degree of care which the carrier was bound to use to avoid injury to such passenger, through the negligence of its own servants or agencies, while such passenger is engaged in the necessary acts of such transfer.

The next question involved here is whether or not the doctrine of *res ipsa loquitur* applies. It is admitted by the plaintiff in error that it does not apply as to the third and fourth counts, in that they contain special charges of negligence, but it is earnestly urged by him that this doctrine does apply to the first and second counts. The doctrine of *res ipsa loquitur* may be stated thus: When a thing which has caused an injury is shown to be under the management of the party charged with negligence and the accident is such as in the ordinary course of things will not happen if those who have such management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation by the parties charged, that it arose from the want of proper care. (*Chicago Union Traction Co. v. Giese*, 229 Ill. 260.) In the case just cited the first and second counts of the declaration charged that the defendant, by its servants, carelessly, improperly and negligently drove and managed a train consisting of two coaches so that the rear car struck the wagon of the plaintiff in which he was

riding and thereby he received the injury complained of. In those two counts the charges of negligence were held to be general and it was held that the doctrine of *res ipsa loquitur* applied. The same rule is laid down in *O'Callaghan v. Dellwood Park Co.* 242 Ill. 336. The charges of negligence in the first two counts in the case at bar are in substantially the same language as those in *Chicago Union Traction Co. v. Giese, supra*. It is charged by the first count that plaintiff, without fault or negligence on his part, was struck by and run into and over by defendants, who then and there so carelessly, negligently and improperly managed and operated said car that by reason thereof the car left the track and struck and collided with the plaintiff. The second count charges that the defendants so carelessly, negligently and improperly managed and operated the electric car that by reason thereof the car then and there collided, struck and ran against the plaintiff. The charges of negligence in these counts were general and the doctrine of *res ipsa loquitur* applies. The rule is that negligence is never presumed, but that the circumstances surrounding the case where the maxim of *res ipsa loquitur* applies, amount to evidence from which the facts of negligence may be found; that is, in a case within the maxim of *res ipsa loquitur*, proof of the circumstances of such case and of the injury constitutes a *prima facie* case of negligence, and will justify a verdict unless such *prima facie* case is overcome by proof showing that the party charged is not at fault. (*Chicago Union Traction Co. v. Giese, supra*; *Chicago Union Traction Co. v. Newmiller*, 215 Ill. 383; *Chicago City Railway Co. v. Rood*, 163 id. 477; *New York, Chicago and St. Louis Railroad Co. v. Blumenthal*, 160 id. 40; *Hart v. Washington Park Club*, 157 id. 9.) The burden rested upon defendants in error to overcome the presumption of negligence arising from the circumstances in this case. The record contains no evidence explaining the cause of the accident or overcoming the presumption of negligence. We

are of the opinion, therefore, that the plaintiff in error was at the time of the injury a passenger, to whom defendants in error owed the highest degree of care, and that under the first and second counts of the declaration and the circumstances in this case a *prima facie* case of negligence was made out under the doctrine of *res ipsa loquitur*. There was no explanation of why the injury occurred. It follows that there was no evidence on the part of the defendants in error to overcome this presumption, and the jury were therefore justified in returning a verdict finding defendants in error guilty of negligence.

Defendants in error also complain of the admission of testimony offered by plaintiff in error concerning the danger of a certain operation, upon the ground that such operation was not contemplated, urging that under the rule recognized in this State the dangers of an operation not contemplated are not elements of damages. We are of the opinion, however, that in view of the fact that the permanency of the plaintiff's injury is not disputed the testimony could only affect the amount of the verdict, and that under the circumstances of this case the error complained of should not, of itself, have reversed the judgment.

It is also urged by defendants in error that even though the judgment of the Appellate Court be reversed, the cause should be remanded for a new trial under the Practice act. Under the views of this case as here expressed, however, the contention of the defendants in error is not applicable, as the judgment of the trial court must be affirmed.

Objections are also urged as to instructions given to the jury, but these objections appear to be based principally upon the theory that plaintiff in error was not a passenger. Under the rule as stated here the instructions are not open to this objection.

The Appellate Court erred in holding that the doctrine of *res ipsa loquitur* does not apply and that plaintiff in error was not a passenger upon defendants in error's railway.

The judgment of the Appellate Court will therefore be reversed and the judgment of the circuit court of Cook county affirmed.

Judgment of Appellate Court reversed.

Judgment of circuit court affirmed.

CARTWRIGHT, J., and DUNN, C. J., dissenting:

We do not agree with the conclusion that the plaintiff, as a matter of law, was a passenger while walking on the public street. The rule of law as to what will constitute the relation of passenger and carrier has been firmly established by text books and decisions, which were carefully reviewed and considered in the case of *Chicago and Eastern Illinois Railroad Co. v. Jennings*, 190 Ill. 478. Upon such review and consideration it was said to be uniformly held that the condition must be such that the passenger is under the care of the carrier and must be at some place under the control of the carrier provided for passengers, so that it may exercise the high degree of care exacted from it. The plaintiff having safely alighted from the defendants' car started to the place where he expected to take another car, and while walking on the street was not under the care of the defendants nor on any place provided for passengers or using any of the facilities furnished for passengers but was exercising his right as one of the general public by crossing the street, as he lawfully might. In the *Jennings case* the doctrine of the Massachusetts court, which is now abandoned, was indorsed and adopted. This court has never decided that the relation of carrier and passenger existed under the facts of this case. In *Chicago and Alton Railroad Co. v. Winters*, 175 Ill. 293, the plaintiff was accompanying his car-load of sheep to Chicago and at Bloomington the car was placed in another train being made up for Chicago. The plaintiff was walking on the east side of the freight train toward the switch yards on the grounds of the railroad company, intending to continue his journey in the caboose of the new train. There is no resemblance be-

tween this case and that of *North Chicago Street Railroad Co. v. Kaspers*, 186 Ill. 246, except that the plaintiff had a transfer ticket. That ticket entitled him to ride on the cable-car line to his destination, and he had got on the step at the front end of the car and was stepping up on the front platform when the speed of the train was increased and he fell off and suffered the injury for which he sued. In *Chicago City Railway Co. v. Carroll*, 206 Ill. 318, a trolley pole on the Wentworth avenue car, from which the plaintiff had alighted or was alighting, fell from that car and struck him on the head. He had not got away in safety from the car as the plaintiff had in this case, in which the plaintiff was not within the care or control of the defendant or on a place provided for passengers and therefore was not a passenger. *Illinois Central Railroad Co. v. O'Keefe*, 168 Ill. 115.

Upon the trial of an issue of fact the plaintiff obtained a verdict and judgment for \$5500, and the defendants appealed to the Appellate Court, which held that the plaintiff was not a passenger; that the doctrine of *res ipsa loquitur* was not applicable to the pleadings in the case, and that the trial court committed errors of law as to both those questions. For such errors the judgment was reversed and the cause remanded to the circuit court for a new trial. The plaintiff then stated that he had relied upon the doctrine of *res ipsa loquitur* and would be unable to produce further evidence of the special negligence upon another trial, and moved the court to reverse the cause without remanding, which was done. If the Appellate Court was wrong both upon the question whether the plaintiff was a passenger and also whether the doctrine of *res ipsa loquitur* applied, that fact does not justify an affirmance of the judgment of the trial court. If plaintiff was a passenger, that fact would not entitle him to a verdict for every injury sustained but would only affect the degree of care exacted by law from the defendants. The doctrine of *res ipsa loquitur* is, that

when a thing which has caused an injury is shown to be under the management of the party charged with negligence, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation of the party charged, that it arose from the want of proper care. It is but a rule of evidence, under which a charge of negligence is established *prima facie* by proof of facts within the rule, and which will justify a verdict unless the *prima facie* case is met by proof showing that the carrier was not at fault. (*Chicago Union Traction Co. v. Giese*, 229 Ill. 260.) On the trial the defendants introduced evidence that the switch which carried the rear trucks around to the west was in proper condition; that there had never been any trouble with it and that an examination immediately after the accident showed nothing the matter with it. The fact that the front trucks passed over the switch in the usual way tended to prove that the rear trucks swinging around was caused by some condition which the defendants were not bound to anticipate. The defendants also offered evidence that the running apparatus and equipment of the car were all in good condition and not defective and had been running since 5:30 that morning without any indication of anything wrong. If the Appellate Court was right in holding that the trial court misapplied the law it was the duty of the Appellate Court to remand the cause for another trial, at which such errors could be corrected. The plaintiff could not deprive the defendants of the right to present on another trial any evidence they might have to relieve themselves from the charge of negligence, by stating to the Appellate Court that he would be unable to produce further evidence of special negligence upon such trial. This court cannot decide questions of fact in controversy, and on a review of the judgment of the Appellate Court has merely held that that court was wrong in its rulings on questions of law.

(No. 12600.—Judgment affirmed.)

THE PEOPLE *ex rel.* Rufus M. Potts *et al.* Defendants in Error, *vs.* THE CONTINENTAL BENEFICIAL ASSOCIATION *et al.* Plaintiffs in Error.

Opinion filed June 18, 1919—Rehearing denied October 9, 1919.

1. STATUTES—*when proviso may be given effect as an independent enactment.* While it is a general rule of statutory construction that the office of a proviso is not to enlarge but to limit and qualify what is affirmed in the body of the act preceding it, yet where it is apparent from the entire act that the proviso was intended as an independent provision it will be given such effect without reference to the limitations of the preceding enactment.

2. BENEFIT SOCIETIES—*when receiver may be appointed to protect assets of foreign corporation.* As the business of beneficial insurance societies is affected with a public interest their assets and property are regarded as in the nature of trust funds, and the power to appoint a receiver inheres in courts of equity to protect the property of a foreign corporation of that character within their jurisdiction from misuse, misapplication or removal from the State when necessary to secure rights and prevent a failure of justice, although the courts in the home State of the corporation have already placed its affairs in the hands of a receiver.

3. SAME—*court appointing receiver of property of foreign corporation may retain jurisdiction to determine rights of individual creditors.* Where a court of equity appoints a receiver to collect the assets of a foreign benefit association which has become insolvent, it may retain jurisdiction of the case for determination of the rights of individual creditors when the assets are collected and ready for distribution.

WRIT OF ERROR to the Second Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. AUGUSTUS A. PARTLOW, Judge, presiding.

DAVID K. TONE, for plaintiffs in error.

EDWARD J. BRUNDAGE, Attorney General, RYAN, CONDON & LIVINGSTON, and CHURCH, SHEPARD & DAY, (IRVIN I. LIVINGSTON, and CLYDE L. DAY, of counsel,) for defendants in error.

Mr. JUSTICE FARMER delivered the opinion of the court :

On November 17, 1916, the Attorney General of Illinois filed a bill in the superior court of Cook county in the name of the People, on the relation of Rufus M. Potts, Superintendent of Insurance, against the Continental Beneficial Association of Philadelphia, a corporation organized under the laws of the State of Pennsylvania, and its officers, praying that they be enjoined from disposing of or removing from this State any assets of the corporation, (referred to hereafter as the association,) and also praying the appointment of a receiver to take possession and management of the property of the association in this State. The bill alleged the association had obtained a license in 1912 to do business in the State of Illinois; that through mismanagement, extravagance and waste the association had become hopelessly insolvent and its liabilities far exceeded its available assets; that the association had a membership of about 12,000, many of whom were residents of the State of Illinois, holding policies issued to such respective members or re-insurance contracts. On the same day the bill was filed a preliminary injunction was ordered issued, restraining the association from removing or disposing of its assets in this State and appointing the Chicago Title and Trust Company receiver *pendente lite*, with the usual powers of receivers. Defendants appealed from this interlocutory order to the Appellate Court for the First District. That court affirmed the interlocutory decree. *People v. Continental Beneficial Ass'n*, 204 Ill. App. 501.

On the 28th of November, 1916, the president of the association filed a bill in the court of common pleas for the county of Philadelphia, in the State of Pennsylvania, alleging the association was insolvent and unable to continue business; that the directors had passed a resolution authorizing the president to apply for the appointment of a receiver and for the dissolution of the corporation on account of its insolvency. David Phillips was appointed receiver in said suit, as prayed in the bill.

On the 5th day of December, 1916, David Phillips, the Pennsylvania receiver, Adelaide Weiger and Clara Weiger, beneficiaries of a deceased policyholder of the association, filed a bill in the circuit court of Cook county, on behalf of themselves and all other creditors, members and certificate holders, against the association and the Fort Dearborn National Bank, as depository of the moneys of the association, alleging the association was incorporated under the laws of Pennsylvania as a fraternal insurance society; that it had engaged in the fraternal insurance business in Pennsylvania and various other States, including Illinois; that the association was insolvent and unable to pay its liabilities and continue business. The bill alleged that at the suit authorized by the directors in the State of Pennsylvania for the appointment of a receiver and the dissolution of the corporation David Phillips was appointed by said court receiver of the association; that he qualified as such and ever since has been, and is, acting as receiver; that Adelaide Weiger and Clara Weiger are the beneficiaries of a deceased policyholder and each entitled to benefits in the sum of \$330.66. The bill prayed the appointment of an ancillary receiver to take charge of the property of the association situated in the State of Illinois, wind up the business of the association in this State, and distribute, as directed by the court, the assets and property. The association answered this bill the same day it was filed, admitting its allegations and joining in the prayer for the appointment of an ancillary receiver.

On the 6th day of December, 1916, the People, on the relation of Rufus M. Potts, insurance superintendent, by the Attorney General, filed an amended supplemental bill, alleging the proceedings in Pennsylvania for the dissolution of the corporation and the appointment of David Phillips, receiver, there. The bill alleged said receiver was attempting to collect and remove from the State of Illinois the association's assets and property, and prayed he be enjoined

from doing business in Illinois and from interfering with the action of the Chicago Title and Trust Company, receiver, in the collection and distribution of the assets of the association in Illinois, and that all orders previously entered in the proceeding be confirmed and made permanent. The answer to the amended supplemental bill, among other things, denied the jurisdiction of the court to entertain the bill, and denied the right of the Attorney General, on behalf of the People, to file a bill for the purposes for which the amended supplemental bill was filed in the courts of this State. The answer further denied that the proposed withdrawal of assets and property of the association from this State was for the purpose of defrauding anyone, and averred the proposed withdrawal was pursuant to a resolution of the board of trustees of the association that such withdrawal was for the best interests of the association.

On the same day the amended supplemental bill was filed the court entered an order enjoining Phillips, receiver, and the Weigers, their agents and attorneys, from prosecuting their suit until the further order of the court. The final decree enjoins the association from transacting any further business in Illinois, and orders its assets in this State to be collected and conserved by the receiver appointed in this State, the Chicago Title and Trust Company, for distribution under the order of the court, and further decrees that all orders before entered be and they are confirmed and made permanent. The Appellate Court affirmed the decree, and this court having granted a petition for a writ of *certiorari* the cause comes here for review.

Plaintiffs in error contend that the Attorney General had no authority, at common law or under the statutes of Illinois, to institute the suit for the appointment of a receiver of a foreign corporation; that the courts of Pennsylvania had exclusive jurisdiction to dissolve the corporation and distribute its assets among its creditors. It is further plaintiffs in error's contention that when Phillips,

the receiver appointed by the Pennsylvania court, filed his bill in the circuit court of Cook county praying the appointment of an ancillary receiver and that court acquired jurisdiction of the association, no other court could supplant the jurisdiction thus acquired; that Phillips had the exclusive right to collect and distribute the corporation's assets among its creditors, and to that end he had power to maintain suits in all States where it had property, and to secure the appointment of ancillary receivers in foreign States to collect assets there situated and transmit them to the domicile of the corporation for distribution. It is argued that as the courts of one State have no power to dissolve a corporation organized under the laws of another State, no suit can be maintained in the name of the people of the State to appoint a receiver of the property of a foreign corporation situated in this State and no such power is conferred by statute.

The act concerning corporations of the character of the plaintiff in error association, prior to the act of 1893, authorized the Auditor of Public Accounts, (now the Superintendent of Insurance,) when he had reason to doubt the solvency of any foreign corporation, association or society, to report the same to the Attorney General, who would thereupon commence proceedings by *quo warranto* against such corporation, requiring it to show cause why its license to do business in the State should not be revoked. Section 12 of the act of 1895 (Hurd's Stat. 1917, p. 1759,) provides that the books, papers and vouchers of all corporations to which the act applies shall be subject to visitation and inspection by the insurance superintendent, and the officers of the corporation are required to answer, under oath, inquiries made by said insurance superintendent and to make annual reports, and for neglect or refusal to do so the corporation shall be excluded from doing business in this State. Said section further provides that if the corporation shall exceed its powers and shall fail to comply

with other requirements mentioned, the insurance superintendent shall cause to be commenced an action against the society to enjoin it from carrying on business, "*Provided, however,* that no injunction against any society within this State, or application for or appointment of a receiver, or action to prevent any such society from carrying on business in this State shall be made or granted by any court, except on the application of the insurance superintendent or of a judgment creditor, and after written notice duly made and served upon the chief executive officer of such society within this State, or if incorporated under the laws of another State then such notice may be served by sending the same to the president or secretary of the society by registered mail at the home office of the society, and a full hearing before such court, whether the party seeking such relief be the State, member of such society or any other person whatsoever."

It is insisted that the office of a proviso is not to enlarge but to limit and qualify what is affirmed in the body of the act preceding it, and this is a general rule of statutory construction; but it has been held that "to this rule of construction, however, there is an exception, which is, that where it plainly appears from a consideration of the entire act that the provision considered was intended by the legislature as an independent enactment, it may be so given effect without reference to the limitations of the preceding portions of the section to which it is apparently a proviso." (*Hackett v. Chicago City Railway Co.* 235 Ill. 116, and cases there cited.) It seems evident from reading section 12 that the proviso quoted was not intended to limit the scope of the enactment preceding it. Its language could perform no such office. No mention is made, preceding it, of the appointment of a receiver, and the words of the proviso that no receiver should be appointed in such suit except under the conditions prescribed can only mean, as we understand it, that the legislature assumed or had in mind that courts

of equity had jurisdiction to appoint receivers in such cases, and what was intended by the proviso was to define under what conditions the appointment should be made.

The numerous statutes on the subject show a policy of the State to regulate insurance companies doing business in this State, foreign and domestic, for the protection of the citizens of this State. The business of beneficial insurance societies is affected with a public interest, (*North American Ins. Co. v. Yates*, 214 Ill. 272; *Stockton v. Central Railroad Co.* 50 N. J. Eq. 80;) and their assets and property are regarded in the nature of trust funds, and the power to appoint a receiver inheres in courts of equity to protect the property within the jurisdiction from misuse, misapplication or removal from the State when necessary to secure rights and prevent a failure of justice. There are abundant authorities holding that while the courts of one State have no power to dissolve a corporation organized under the laws of another State or to appoint a receiver of a foreign corporation, yet courts of equity having power to issue injunctions to prevent the dissipation and misapplication of corporate assets within the jurisdiction have also power to make the remedy effective by appointing a receiver of assets and property of the corporation within the State and require a just and equitable distribution thereof among the creditors and persons entitled thereto. 2 Bacon on Life and Accident Ins. sec. 657; 12 R. C. L. 106; 3 Cook on Corp. sec. 871; 5 Thompson on Corp.—2d ed.—par. 6332; 34 Cyc. 23; 5 Pomeroy's Eq. Jur. 116; *Blake v. McClung*, 172 U. S. 239; *Piltz v. Supreme Chamber*, 19 Atl. Rep. (N. J.) 668; *Popper v. Supreme Council*, 70 N. Y. Supp. 637; *Murray v. Vanderbilt*, 39 Barb. 140; *Culver Lumber Co. v. Culver*, 81 Ark. 102; note to *Babcock v. Farwell*, 19 Am. & Eng. Ann. Cas. 91.

It is pointed out in the authorities cited, or some of them, that there is a radical distinction between the appointment of a receiver of the assets and property of a foreign

corporation within a State for the purpose of preserving it for and distributing it among the persons entitled to it, and the appointment of a receiver of the corporation, and it is held the courts of one State may appoint a receiver of the property in that State notwithstanding the appointment of a receiver at the domicile of the corporation. (34 Cyc. 98; 12 R. C. L. 106; *Stamm v. Northwestern Mutual Benefit Ass'n*, 65 Mich. 317; *Lehr v. Murphy*, 136 Wis. 92; *Fawcett v. Iron Hall*, 64 Conn. 170; *Security Savings and Loan Ass'n v. Moore*, 151 Ind. 174.) In the Indiana case a receiver was appointed in that State of the property in Indiana of a Minnesota corporation. A receiver of the corporation had been appointed in Minnesota. This was shown to the Indiana court in support of a motion to vacate the appointment in that State. The court said: "It is true there may be a possibility, or even a probability, that the affairs of the insolvent association might be settled to the best interests of all stockholders and creditors by the home receiver, alone, rather than by the action of separate receivers in the several States where the association has assets. (*Cowen v. Failey*, 149 Ind. 382; 49 N. E. 270.) That, however, is a question to be decided on the mature judgment of the trial court when all the facts become known. If it is found to be more equitable in the end, and not against the interests of appellee and other residents of Indiana, that all assets in this State should be placed in the hands of the home receiver, appointed in Minnesota, no doubt that course will be taken. Nevertheless, the mere circumstance that there is a receiver in another State does not make it improper to appoint a receiver here." In *Holbrook v. Ford*, 153 Ill. 633, this court held a court in this State may appoint a receiver of the property of a foreign corporation situated in this State although the courts in the home State of the corporation may have already placed its affairs in the hands of a receiver, and cited several cases in support of the holding. In *Edwards v. Schil-*

linger, 245 Ill. 231, this court said: "The courts of one State have no power to dissolve a foreign corporation and wind up its affairs, but it will retain its legal existence until dissolved by a proceeding in the State which created it. But even in that case, assets which are a trust fund for shareholders and creditors will be administered by the domestic courts where they are found."

The authorities sustain the right of the Attorney General to file the bill and the jurisdiction of the superior court to entertain it, and, if necessary to prevent injustice, to appoint a receiver of the assets and property of the association situated in this State. It is not denied the facts found in the decree justified the action of the court if it had jurisdiction, but the contention is that the court was without jurisdiction to entertain the bill and grant the relief decreed, or that, in any event, when Phillips filed his bill showing his appointment as receiver of the corporation in its home State, it was the duty of the circuit court of Cook county to appoint an ancillary receiver with directions to collect and secure the property of the corporation in this State. The authorities referred to are contrary to these contentions. The decree directed the receiver appointed by the circuit court (the Chicago Title and Trust Company) to collect, marshal and disburse the assets of the corporation in this State, under the directions of the court, "to the creditors of the association within, or who may come within, the association, and among such other persons who may be entitled to share therein according to their respective rights thereunder, for which purpose this court respectfully retains jurisdiction in this cause." It will be seen the rights of the individual creditors were not determined by the decree but were reserved for determination hereafter, when the assets have been collected and are ready for distribution. This the court was authorized to do. *Blake v. McClung*, *supra*; *Fawcett v. Iron Hall*, *supra*; *Security Savings and Loan Ass'n v. Moore*, *supra*.

Some other questions not affecting the merits of the case are raised, but in the view we have taken of the case their discussion is not important or necessary to a decision of the case.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(No. 12549.—Judgment reversed.)

WILLIAM BRENNAN, Plaintiff in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.*—(JOHN MOORE, Defendant in Error.)

Opinion filed June 18, 1919—Rehearing denied October 9, 1919.

WORKMEN'S COMPENSATION—*when employee engaged in constructing hard road is not employed in hazardous occupation.* An employee who is engaged in assisting in the construction of a hard surface on a State-aid road is not employed in a hazardous occupation within the meaning of the Workmen's Compensation act, where his only duty is to assist in pulling a large float over the soft concrete mixture after it has been placed on the roadway; and the fact that other employees may be engaged in some other part of the work that is extra-hazardous does not bring said employee within the provisions of the act. (*McLaughlin v. Industrial Board*, 281 Ill. 100, explained.)

WRIT OF ERROR to the Circuit Court of LaSalle county; the Hon. EDGAR ELDREDGE, Judge, presiding.

ZIMMERMAN, GARRETT & RUNDALL, for plaintiff in error.

R. C. DONOGHUE, and BUTTERS & CLARK, for defendant in error.

Mr. JUSTICE FARMER delivered the opinion of the court:

William Brennan, plaintiff in error, is a contractor and had a contract to construct a hard surface on a State-aid road in LaSalle county. The construction was a cement

base and brick top. In doing the work the cement was mixed by a mixer operated by steam. After the cement was mixed and thrown on the roadway a float eighteen feet long, weighing between four hundred and six hundred pounds, was pulled by employees by hand, by means of ropes attached, over the soft cement mixture for the purpose of smoothing and leveling it down. John Moore was employed by plaintiff in error to assist in pulling this float over the cement. It appears it was sometimes necessary to lift up one end of the float. While engaged in lifting an end of the float Moore's thigh was injured by a tearing or rupture of one of the muscles. The injury incapacitated him for work thereafter, and for some time he received treatment in a hospital and also from physicians outside of a hospital. He claims the injury is permanent and that he is incapacitated for manual labor,—the only kind of employment in which he was ever engaged. He presented a claim for compensation and was awarded \$5.50 per week for a period of 361 weeks, which on review by the circuit court was affirmed. Brennan, the employer, filed a petition in this court for a writ of error, which was allowed, and the case comes here for review.

The important question involved is, was Moore employed in a hazardous occupation? If he was not, then there is no liability. Defendant in error argues that plaintiff in error was engaged in the work of surfacing a public road with concrete and brick; that in doing this work he used a concrete mixer operated by steam and the ordinary tools for the kind of work he was doing. In support of this contention defendant in error cites *McLaughlin v. Industrial Board*, 281 Ill. 100, where it was held a common dirt road is not a structure within the meaning of the Workmen's Compensation act, and that the building or repairing of such a road is not an extra-hazardous occupation within the meaning of the statute. In the opinion in that case the court said that some constructions of public

roads might be extra-hazardous where cement mixtures are formed and placed on the road and where crushed rock is used. This expression is relied on by defendant in error as a decision that constructing or repairing road surfaces with cement mixtures or crushed rock is extra-hazardous and that all persons engaged in any part of the work are subject to and under the Workmen's Compensation act. We think this a clear misapprehension of the court's meaning. All the court meant was to limit the decision to the character of the road involved in that case, which was a dirt road, and to not hold, generally, that road repair and construction could in no case be deemed extra-hazardous. It is possible that some parts of the work of spreading cement in road construction or repair may be extra-hazardous, such as preparing and mixing the material to be spread upon the road, but defendant in error's employment and duties did not require him to engage in or come in contact with this kind of work. His sole employment was to pull the float over the cement after it had been placed on the roadway. This was not extra-hazardous within the meaning of the statute, and because some other employees may have been engaged in some other part of the work that was extra-hazardous would not change the character of the defendant in error's employment or bring him within the provisions of the Workmen's Compensation act. In *Vaughan's Seed Store v. Simonini*, 275 Ill. 477, it was held section 3 of the Compensation act refers primarily to the business and not to the person of the employer, and its provisions cannot be extended to apply to a cause of action not having any connection with the hazardous occupations mentioned. See, also, *Marshall v. City of Pekin*, 276 Ill. 187, and *Sanitary District v. Industrial Board*, 282 id. 182.

Defendant in error was not engaged in anything extra-hazardous within the meaning of the statute, and the award is set aside and the judgment of the circuit court reversed.

Judgment reversed and award set aside.

(No. 12629.—Judgment affirmed.)

JOHN U. METZGER vs. CHARLES F. EMMEL *et al.*—
(CHARLES F. EMMEL *et al.* Plaintiffs in Error, vs.
LISSETTA SPRINGER, Defendant in Error.)

Opinion filed June 18, 1919—Rehearing denied October 10, 1919.

1. PLEADING—*affirmative relief in equity cannot be given on answer.* Affirmative relief in equity cannot be given upon an answer, whether the relief is sought against the complainant or a co-defendant.

2. MORTGAGES—*when answer need not be stricken as asking affirmative relief.* On a bill to foreclose a mortgage, where the only controversy is between the mortgagor and his grantee to determine what property shall be first sold, the answer of the grantee setting out the facts connected with the conveyance and tending to show the equities to be in her favor as against the mortgagor need not be stricken as asking affirmative relief, where the mortgagor first raises the question in his answer, asking that the property conveyed be sold first in order to protect his home place.

3. SAME—*application of rule of sale in inverse order of alienation.* Where mortgaged property is sold without any clause in the deed subjecting it to the incumbrance, property remaining in the grantor and subject to the mortgage should be sold first on foreclosure; but where a deed is made subject to a mortgage incumbrance the rule of sale in the inverse order of alienation does not apply, and if the amount of the incumbrance is part of the consideration the grantee is liable therefor.

4. SAME—*true consideration in deed may be shown by parol evidence.* In a proceeding to foreclose a mortgage, a grantee of the mortgagor, though the deed recites that it is subject to the mortgage, may show that the true consideration for her deed was the mortgagor's indebtedness to her to the full value of the property conveyed and that their agreement was that other property of the mortgagor covered by the mortgage should be sold first in case of foreclosure.

5. SAME—*when the doctrine of marshaling of assets may be applied.* Where a conveyance of mortgaged property by the mortgagor is in the nature of security for another debt of his, in a proceeding to foreclose the mortgage the doctrine of the marshaling of assets may be applied to protect the grantee against a prior sale of the property, where the mortgagor has other property which is subject to the mortgage.

6. *SAME—the doctrine of marshaling of assets stated.* Where a creditor has a lien upon two securities with which to make his debt and another party has an interest in one of the securities, the creditor may be required first to exhaust the security in which the other party has no interest.

WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Fayette county; the Hon. THOMAS M. JETT, Judge, presiding.

F. M. GUINN, for plaintiffs in error.

JOHN H. WEBB, for defendant in error.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

John U. Metzger filed his bill in chancery to foreclose a mortgage executed by plaintiffs in error, Charles F. Emmel and Belle F. Emmel, his wife. This writ of error is brought to review the judgment of the Appellate Court affirming the decree entered in that cause.

The assignment of errors raises no question for determination between John U. Metzger and the other parties to this suit, the questions in controversy being between Charles F. Emmel and Belle F. Emmel, his wife, (hereafter referred to as the Emmels,) on the one hand, and Lisetta Springer on the other. All were defendants in the court below.

The Emmels, being indebted to G. T. Turner in the sum of \$6125, gave to Turner their note secured by a mortgage on two lots in Vandalia, Illinois, and two eighty-acre farms in Fayette county, Illinois. Later this note and mortgage were assigned to John U. Metzger. The Emmels and the widow of Fred Emmel, deceased, father of Charles F. Emmel, on March 14, 1917, conveyed by warranty deed of that date to Mrs. Springer the two farms described in the mortgage, together with other real estate, for the consideration

of \$10,588.10. The two lots in Vandalia were not included. After describing the real estate conveyed this clause was inserted in the deed: "The above last three described tracts being subject to \$6125 mortgage given to G. T. Turner." The tracts mentioned included the two farms described in the mortgage. Metzger, as holder of the legal title to said note, brought suit to foreclose his mortgage on the two lots in Vandalia and the two farms in Fayette county, making Charles F. Emmel and Belle F. Emmel, the makers of said note, Lisetta Springer, owner of the equity in the two farms, and Herschel Donaldson and Hick Davis, occupants of part of the premises, defendants. The bill of complaint sets forth the execution of the note and mortgage, default in payment and provisions of the mortgage as to foreclosure. The bill also sets forth the conveyance from the Emmels to Mrs. Springer of the two farms in Fayette county, and that Mrs. Springer is the owner of the same subject to the mortgagee's interest. The bill prays that the defendants be required to answer, asks for an accounting, and, in default of payment of the amount found to be due, that the mortgaged property be sold as the court may direct.

On May 18, 1917, the Emmels answered the bill, admitting execution of the note and mortgage, the assignment of the note and the conveyance to Mrs. Springer. The answer then states that at the time of the execution of the note and mortgage the Emmels occupied the two lots in Vandalia as a homestead and have continued to so occupy the same; that at the time they conveyed the two farms in Fayette county to Mrs. Springer the conveyance was made and accepted subject to the mortgage. The answer further states that the decree of sale should provide for selling the lands conveyed to Mrs. Springer first, and that if said lands bring sufficient to discharge the mortgage indebtedness and costs then the lots in Vandalia should not be offered for sale.

Mrs. Springer's answer was filed subsequent to the answer of the Emmels, and after admitting the indebtedness

set forth in the bill, the execution of the warranty deed to her by the Emmels and the widow of Fred Emmel, deceased, stated that the lands were acquired subject to a mortgage, but that there were certain qualifications as to the deed to the lands being accepted subject to the mortgage; that she is a widow, unable to readily read and write English understandingly and that she has to depend upon others for information; that Fred Emmel, now deceased, and father of Charles F. Emmel, acted as her agent and adviser, and that she had great confidence not only in him but also in Charles F. Emmel; that she acted upon their advice in her business affairs; that they attended to her loans, and that the loans were usually made in the name of Charles F. Emmel and were then indorsed in blank by him and turned over to her; that in 1913 Charles F. Emmel wanted to borrow from her the sum of \$1320 and offered as collateral security a note for \$2200 purporting to have been signed by Frank C. Eckard, H. A. Bingaman and Herbert Sonnemann; that she furnished \$1100 of the amount and her son Herman \$220; that Emmel gave his two notes for the amounts and assigned the Eckard-Bingaman-Sonnemann note to her, cautioning her to say nothing about the note so assigned by him, as these persons were directors in the bank and were not in the habit of giving notes and that they would not like it known; that in 1916 Charles F. Emmel again wanted a loan in the sum of \$550, and offered as collateral security a note purporting to have been signed by John U. Metzger and E. M. Doyle for \$1100, and that her daughter furnished the money for this loan, Emmel giving his own note for the amount of the loan and assigning the Metzger-Doyle note, at the same time cautioning her to say nothing about it; that she afterward acquired the title to the notes given her son and daughter; that for nearly two years prior to his death Fred Emmel was in poor health and that Charles F. Emmel did all the business; that in 1917 Charles F. Emmel sent a written order to her ask-

ing that she deliver to the bearer a note, mortgage and abstract covering a loan of \$600 which she held against W. C. Miller, and that she complied with this request; that in January, 1917, upon further request from Charles F. Emmel she delivered to him a note for \$900, secured by a mortgage given by James M. Hopkins; that later in January, 1917, Charles F. Emmel came to her and asked for all her notes and mortgages, stating that his father wanted them and that they needed attention. These notes amounted to \$5125, and Charles F. Emmel was the payee in said notes and he had indorsed each of them in blank. Copies of all the notes and mortgages are incorporated into the answer. The answer further stated that Fred Emmel died intestate on March 3, 1917, leaving his widow, Edythe V. Emmel, and Charles F. Emmel, his only son and heir; that he left his affairs in a tangled condition, and that thereupon she employed counsel to secure from Charles F. Emmel the notes and mortgages she had given him; that she found it was impossible to secure the same, they having been placed out of his control; that Charles F. Emmel wanted to make some sort of settlement with her; that he returned one note of \$550 given by Nancy Wall; that she became satisfied that the collateral notes held by her were forgeries and that she was out \$10,588.10,—practically all she had; that Emmel's mother was also anxious to have the matter settled, and that Emmel represented that in addition to the two farms described in the mortgage he became, by reason of the death of his father, the owner, with his mother, of another tract of land known as the Wilberton farm, and also a part of a vacant lot in Vandalia; that his father left sufficient money to pay all his debts; that the question of values and equities was fully considered; that Emmel was very anxious to get the matter settled, and stated that the home place, being the two lots in Vandalia and included in the mortgage held by Metzger, should be sold first in foreclosure, and that but a small burden, if any, would rest

upon the tracts conveyed to her; that Emmel stated that his wife would join in the deed, and that the deed was accordingly made, the consideration being the amount of her claim of \$10,588.10, which represented the amount of the notes and mortgages which Emmel failed to return to her, together with the amounts of money borrowed; that she did not become responsible for the mortgage indebtedness, nor was such indebtedness a part of the consideration price of the land, nor was the amount of said mortgage debt deducted from the price and held or retained by her. The answer asks that in case of sale the home place, being the two lots in Vandalia, be sold first to satisfy the mortgage indebtedness.

The Emmels moved to strike the answer of Mrs. Springer from the files for scandal and impertinence, which motion was overruled by the court. A replication was filed and the cause referred to the master in chancery to take proofs. Proofs were taken. The chancellor approved the master's report and entered a decree of foreclosure in favor of the complainant. The chancellor found, among other things, that as between the Emmels and Mrs. Springer the equities were with Mrs. Springer; that Emmel executed the deed in order to get possession of the forged notes in her possession; that one of the moving considerations which induced Mrs. Springer to accept the deed from the Emmels and the widow of Fred Emmel was that the two lots in Vandalia, they being the home place, would discharge the greater part of the mortgage indebtedness and that at least one of the mortgaged farms conveyed to her would be clear, meaning that the home place should be sold first; that Emmel's wife was not a party to the understanding; that during the pendency of the suit Emmel conveyed the home place to his wife and that the Emmels then mortgaged the same to F. M. Guinn, solicitor for the Emmels; that whatever interest Emmel's wife took by virtue of the deed from him to her, as well as whatever interest Guinn took

by virtue of the mortgage from the Emmels to him, was taken *pendente lite* and subject to all the equities of Mrs. Springer; that the scrivener who prepared the deed inadvertently and by mutual mistake inserted in the deed that the conveyance was made subject to a mortgage indebtedness in the sum of \$6125; that the Emmels have a homestead estate to the extent of \$1000 in the home place as against Mrs. Springer; that the two lots in Vandalia, known as the home place, should be first exposed for sale, and that out of the proceeds the homestead interest of the Emmels, amounting to \$1000, should be paid to those entitled thereto and the balance applied to the mortgage debt, and that the remainder of the real estate covered by the mortgage and conveyed to Mrs. Springer, or so much thereof as might be necessary, be sold to pay the balance of the mortgage indebtedness, and that in case when the remainder of the real estate is sold sufficient is not realized to discharge the mortgage indebtedness and costs, so much of the \$1000, being the amount of the homestead, as is necessary be used for that purpose. A decree was entered in accordance with the foregoing findings, and the Emmels excepted and prayed an appeal to the Appellate Court. The Appellate Court affirmed the judgment of the trial court, and the cause is brought here by *certiorari*.

Owing to the nature of the assignment of errors we have stated the pleadings and findings of the chancellor at length. The controversy finally resolves itself into the question as to the order in which the real estate conveyed by the mortgage given by the Emmels to Turner, and in turn assigned to Metzger, shall be offered for sale. The Emmels contend that the tracts conveyed to Mrs. Springer should be offered for sale first, and that if they bring sufficient to discharge the mortgage indebtedness and costs, the two lots in Vandalia, known as the home place, shall not be offered for sale, while Mrs. Springer contends that these two lots in Vandalia shall first be offered for sale, and if they bring

sufficient to discharge the mortgage indebtedness and costs that the tracts conveyed to her shall not be sold. There are certain questions raised by the assignment of errors which we will dispose of before passing upon the above and most vital question.

In the petition for *certiorari* the petitioner contended for the proposition that the chancellor erred in refusing to strike the answer of Mrs. Springer from the files, for the reason that the relief prayed for had no foundation laid for it in the answer and that the answer asked for affirmative relief, which may only be granted upon a cross-bill. Only slight reference is made to this proposition in the brief for the Emmels but sufficient reference is made for us to pass upon the question. It is a general rule of practice in chancery that affirmative relief cannot be given upon an answer, (*White v. White*, 103 Ill. 438; *Cox v. Spurgin*, 210 id. 398;) and this rule governs whether the relief is sought against the complainant or a co-defendant. (*Howe v. South Park Comrs.* 119 Ill. 101.) Much, however, depends upon the scope and purpose of the litigation in determining whether a cross-bill is necessary. (*Nyburg & Provine v. Pearce*, 85 Ill. 393; *Iglehart v. Crane & Wesson*, 42 id. 261.) If a cross-bill be filed by one whose rights are fully disclosed by his answer responsive to allegations in the original bill, it will be stricken on motion. (*Newberry v. Blatchford*, 106 Ill. 584; see, also, *Chicago and Great Western Railroad Land Co. v. Peck*, 112 Ill. 408.) In the instant case the bill sets forth that Mrs. Springer is the owner of part of the real estate covered by the mortgage by virtue of a warranty deed executed by the Emmels to her, subject to complainant's mortgage, and Mrs. Springer in her answer admits the allegations in the bill as to her ownership. Her answer then sets up facts as to how she became the owner, and asks that in selling in foreclosure, the home place, which was included in the mortgage but not conveyed to her, be sold first, as was agreed at the time

the deed was made, in order that she might be kept whole in a transaction wherein Charles F. Emmel had by gross fraud obtained her money. The Emmels in their answer, which was filed prior to Mrs. Springer's answer, ask that the land mortgaged and conveyed to Mrs. Springer be sold first in order to protect them. That which Mrs. Springer asks in her answer is only incidental to the foreclosure, and, were it not for the clause in the deed with reference to the mortgage indebtedness, we apprehend that the chancellor could rightfully have controlled the order of the sale had the Emmels and Mrs. Springer not raised the question. However, since the Emmels raised the question in the first instance in their answer, they cannot now be heard to complain of the failure of the chancellor to strike from the files Mrs. Springer's answer, which contained the same matter. We find no reversible error in the failure of the chancellor to sustain the motion of the Emmels to strike the answer of Mrs. Springer from the files.

It is next contended that by reason of the clause in the deed from the Emmels to Mrs. Springer (the above last three described tracts being subject to \$6125 mortgage given to G. T. Turner) the court erred in ordering the master to offer the lots in Vandalia, Illinois, known as the home place, for sale first. The master was ordered to retain the sum of \$1000 from the sale price (that being the amount of the homestead of the Emmels in these two lots) until it could be determined whether sufficient would be realized from the remainder of the mortgaged property with which to discharge the mortgage indebtedness and costs,—*i. e.*, under this order the Emmels were to receive the amount of their homestead interest (\$1000) if the homestead interest, or some part thereof, was not required to discharge the mortgage indebtedness and costs. There can be no doubt that Mrs. Springer would have been entitled to have the home place exposed for sale first had it not been for the foregoing clause in the deed, (*Iglehart v. Crane & Wesson*,

supra,) but where a sale is made subject to a mortgage incumbrance the rule of sale in the inverse order of alienation by the mortgagor does not apply. (*Monarch Coal and Mining Co. v. Hand*, 197 Ill. 288.) Where, in purchasing premises which are incumbered, the amount of the incumbrance is taken into account in fixing the consideration and becomes part of the consideration, the purchaser thereby becomes liable for the amount of the incumbrance. (*Drury v. Holden*, 121 Ill. 130; *Siegel v. Borland*, 191 id. 107.) In the instant case the record discloses that it was expressly agreed that Mrs. Springer was not to be liable for the amount of the incumbrance until the other property of the Emmels was exhausted. Computations were made with reference to the value of the land being conveyed, and in making these computations the land was figured at its value without reference to the mortgage. In other words, the land free of the mortgage was figured and not the value of the equity.

In this connection it is contended on the part of the Emmels that the admission of oral testimony as to an understanding between Charles F. Emmel on the one hand and Mrs. Springer and her counsel on the other, with reference to which property should first be exposed for sale in case of foreclosure, was error. We think the law is well settled in this State that the true consideration in a deed may always be shown by parol evidence. (*Drury v. Holden*, *supra*; *Union Mutual Life Ins. Co. v. Kirchoff*, 133 Ill. 368; *Worrell v. Forsyth*, 141 id. 22.) The agreement between Charles F. Emmel and Mrs. Springer was a natural one under the circumstances and it would be inequitable to refuse to enforce it. (*Kern v. Beatty*, 267 Ill. 127.) She was unable to read and write to any degree of understanding and placed implicit confidence in him until she discovered her mistake. Charles F. Emmel was in dire straits. He knew that his crooked dealings were known by Mrs. Springer and her counsel,—dealings for which he could be criminally prosecuted,—and he was exceedingly anxious to

avoid such prosecution, and one of the means to avoid it was to get possession of the evidence of his criminal acts. This he did, in part, in getting back the collateral notes. The evidence shows that he was willing to make any sort of agreement which would settle his affairs with Mrs. Springer, and it was with this situation confronting him that the deed was made. We think the evidence as to the understanding between Charles F. Emmel and Mrs. Springer as to the order in which the mortgaged property should be exposed for sale was properly admitted.

With this understanding properly in evidence, to our view the moving consideration which induced Mrs. Springer to accept the deed was the fact that in case of foreclosure the home place would be sold first. Evidently, she would not have accepted the deed had she understood that the mortgaged lands conveyed to her would first be subject to sale, for in such case her equity in the lands would be extinguished and her claim against Emmel for more than \$10,000 would be discharged and she would get nothing. The chancellor protected the homestead interest of the Emmels in the home place in the decree in accordance with the provisions of section 4 of the Exemption act, (Hurd's Stat. 1917, p. 1494,) and no reversible error was committed in ordering the home place exposed for sale first. Further, if the conveyance to Mrs. Springer be considered in the nature of a mortgage security for the claim due by Charles F. Emmel and the estate of Fred Emmel, deceased, then, under the doctrine of marshaling of assets, Mrs. Springer would be entitled to have the home place sold first. That doctrine is, that where a creditor has a lien upon two securities with which to make his debt and another party has an interest in one of the securities, that party has a right to compel the creditor first to exhaust the security in which the other party has no interest. *Chicago and Great Western Railroad Land Co. v. Peck, supra.*

The decree entered by the chancellor was within the scope and purpose of the bill and pleadings and is in accordance with the principles of equity and justice.

Finding no reversible error in the record the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(No. 12620.—Reversed and remanded.)

JAMES F. BISHOP, Admr., Defendant in Error, *vs.* THE CHICAGO JUNCTION RAILWAY COMPANY, Plaintiff in Error.

Opinion filed June 18, 1919—Rehearing denied October 9, 1919.

1. NEGLIGENCE—*statement of counsel that defendant will be reimbursed for payment of damages is improper.* In an action for wrongful death any statement of plaintiff's counsel which shows that the defendant is being protected from the payment of damages by being reimbursed for such payment is improper because of its influence on the jury.

2. TRIAL—*counsel has no right to "badger" a witness.* There is nothing in the duties of an attorney to his client requiring him to mistreat or "badger" a witness, and the mere fact that the parties are in court, where the witness is on the stand without right to retaliate, does not give counsel the right to subject the witness to mistreatment or insult.

3. SAME—*when court should act promptly in stopping misconduct of counsel.* It is the duty of a court to preserve the respect due to its dignity and the administration of the law, and where an attorney, under the pretense of arguing the case, indulges in the abuse of parties or witnesses the court should act promptly in stopping such misconduct instead of merely sustaining objections.

4. SAME—*when misconduct of counsel will amount to mis-trial.* While the influence of prejudicial statements of counsel, inadvertently made, may generally be overcome by sustaining objections thereto and by retraction, made in good faith, on the part of the offending counsel, yet where counsel, in the presence of the jury, purposely and persistently indulges in acts and statements prejudicial to the rights of the opposite party such misconduct will amount to a mis-trial of the cause, although objections are sustained.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. MARCUS KAVANAGH, Judge, presiding.

WINSTON, STRAWN & SHAW, (SILAS H. STRAWN, JOHN D. BLACK, and EDWARD W. EVERETT, of counsel,) for plaintiff in error.

JAMES C. MCSHANE, for defendant in error.

Mr. JUSTICE STONE delivered the opinion of the court:

Defendant in error, as administrator of the estate of James J. Morrissey, deceased, filed suit in the superior court of Cook county against the plaintiff in error and the Michigan Central Railway Company for damages by reason of the alleged wrongful death of Morrissey. The declaration charged that Morrissey was fatally injured June 24, 1914, while employed as a switchman for plaintiff in error. The declaration also averred that the deceased and his employer and the Michigan Central Railway Company were engaged in inter-State commerce; that Morrissey, while in the exercise of ordinary care, was about to cross the track upon which a Michigan Central engine and caboose were approaching and was negligently run down by said caboose and killed. A trial was had resulting in a verdict for the defendant in error in the sum of \$15,000 damages. A motion for new trial was overruled. At the close of the evidence the cause was dismissed as to the Michigan Central Railway Company. The Appellate Court for the First District affirmed the judgment, and the cause comes here on a writ of *certiorari*.

Morrissey was a switchman and had been in the employ of the plaintiff in error for something like five years, his employment during the greater portion of that time being in and about what is known as the Ashland yards, in the

city of Chicago. On June 24, while engaged in his regular employment, he was riding on the foot-board of a switch engine belonging to plaintiff in error. The engine stopped and Morrissey stepped from the foot-board of the engine and started across the space between the track on which the engine was standing and that upon which a Michigan Central engine, pushing a caboose, was approaching. He had taken but a few steps across this space when he was struck by the corner of the caboose and fatally injured. The negligence charged was that the Michigan Central train was being run at a rate of speed in excess of that permitted by the rules of plaintiff in error and at a rate which was improper and dangerous under the circumstances; that the air whistle on the caboose was not being blown; that the train was approaching deceased from behind, and that the whistle was not blown until after deceased had alighted from the engine on which he was riding, which was too late to avoid the accident.

It is not contended here that the plaintiff in error and the deceased were not engaged in inter-State commerce but such is admitted by plaintiff in error. There are no assignments of error touching the receiving or refusing of testimony or the giving or refusing of instructions to the jury. Plaintiff in error contends that misconduct and remarks of counsel for defendant in error were prejudicial and prevented plaintiff in error from having a fair and impartial trial, and that the court's conduct and remarks constituted reversible error. It is also contended that the evidence was such as to show assumption of risk on the part of the deceased as a matter of law, and that it also shows, as a matter of law, that the contributory negligence of deceased was one hundred per cent.

As to the plaintiff in error's first contention, it seriously urges that the remarks of the counsel for defendant in error during the course of the trial, his statements in argument and conduct towards the witnesses of the plaintiff in

error were such as to influence and prejudice the jury, and numerous instances of such misconduct are cited. It appears that at the close of the evidence, when defendant in error dismissed the case against the Michigan Central Railway Company, the clerk asked counsel for the Michigan Central whether the dismissal was without costs, to which he replied, "No; judgment against the plaintiff for three dollars costs;" that counsel for defendant in error then stated in the hearing of the jury: "You will pay out more than that before we get through; note an exception to the fact that the Michigan Central paid out three dollars; that is not all they did," and turning to the widow of the deceased he said, "Have you three dollars to give to the Michigan Central railroad?" Counsel again said, "You will pay more before we get through." It appears that the judge was in his chambers when this occurred, and upon his return to the bench the record was read and the court declared such practice was wrong and that the jury should disregard the statement of counsel for the defendant in error. The court also said, apparently concerning the conduct of counsel on both sides: "They get fighting like a couple of bull dogs and all that sort of thing, but Mr. McShane did not have any right to say what he said and you may disregard that." This, it is contended, was not only misconduct on the part of the counsel for defendant in error, but that the court should not have criticised counsel for plaintiff in error. It is also urged that these remarks of counsel were especially prejudicial to plaintiff in error when considered in connection with statements made by him in his closing argument, to the effect that the Michigan Central Railway Company would reimburse plaintiff in error for any damages which it might be required to pay. Objection was also made to this statement but was overruled by the court. Statements of counsel made in the presence of the jury concerning the payment of three dollars to the Michigan Central Railway Company and to the effect that it would pay

more before it was through, were not only clearly prejudicial but apparently were intentionally so. Counsel for the railroad company had a right to have a judgment for costs entered in its favor as a final determination of litigation against it. The remarks of counsel concerning that matter could only have the effect of prejudicing the jury. Nor were the statements of counsel for defendant in error that the Michigan Central would reimburse plaintiff in error proper or justified. We have frequently held that any reference to the fact that a party sued is protected by an insurance policy from the payment of damages is improper by reason of its influence upon the jury. Such a statement has been held to be reversible error. (*McCarthy v. Spring Valley Coal Co.* 232 Ill. 473.) Any statement which shows that the defendant in a lawsuit is being protected from the payment of damages by being reimbursed for such payment is error, and the superior court erred in not sustaining the objection of plaintiff in error thereto and in not instructing the jury to disregard the statement.

It also appears from the record that on cross-examination of one of the witnesses for plaintiff in error counsel for defendant in error asked a question to which the witness replied, "I don't know how to answer it." Counsel replied, "Well, answer it; keep to the question and answer it the best you can." Counsel for plaintiff in error said, "He said he does not know how to answer it," and counsel for defendant in error replied, "Answer truthfully; that is one way." To this treatment counsel for plaintiff in error objected and took exception and the court sustained the objection. Examination of the testimony of this witness discloses no evidence that he was attempting to avoid answering the question or to answer it untruthfully, and the inference contained in the statement of counsel was unwarranted. There is nothing in the duties of an attorney to his client requiring him to mistreat or "badger" a witness. Witnesses in their testimony while on the witness stand are

unaccustomed to court procedure, and are, as a result, many times nervous and ill at ease. The mere fact that the parties are in court, where the witness is without right to retaliate, does not give counsel the right to subject a witness to mistreatment or insult.

Numerous other instances more or less prejudicial in their character are charged by counsel for plaintiff in error in their brief, all of which were objected and excepted to by them, some of which were sustained by the court and some were overruled. The record shows that counsel for defendant in error made numerous statements in his argument before the jury which were objected to as prejudicial and tending to affect the verdict of the jury, as to some of which objections were sustained and as to others overruled.

It is contended by counsel for plaintiff in error that during the cross-examination of John Lotts counsel for defendant in error sought to impeach the witness by the inference that he (counsel for defendant in error) was reading from witness' statement, and that when counsel for plaintiff in error objected to such use of a statement before the jury counsel for defendant in error replied, "I will offer this to the jury, if you consent." Upon objection and exception to said statement the court said, "You have a right to consent, haven't you?" This was clearly an improper statement on the part of both the court and counsel for the defendant in error. It is not contended that the paper was competent to go before the jury when this statement was made. The evident effect and the apparent purpose of such a statement in the presence of the jury was to cause them to feel that plaintiff in error was afraid to have said paper read to them. Such conduct was improper and prejudicial to plaintiff in error, and the court should have sustained counsel's objection thereto and admonished the jury concerning the same.

The rule concerning the effect of misconduct of counsel has been stated in numerous cases. In the case of *Ap-*

pel v. *Chicago City Railway Co.* 259 Ill. 561, a judgment of the lower court was reversed for misconduct of counsel. In that case it was said: "In a clear case, however, this court will reverse a judgment because of the improper conduct of counsel, and has reversed judgments because of prejudicial statements of counsel even though the trial court has sustained objections to such statements, rebuked counsel and directed the jury to disregard the statements. (*Wabash Railroad Co. v. Billings*, 212 Ill. 37; *Chicago Union Traction Co. v. Lauth*, 216 id. 176.) The rule in this State must be regarded as settled that misconduct of counsel of the character mentioned is sufficient cause for reversing a judgment unless it can be seen that it did not result in injury to the defeated party. The questions to be determined are, therefore, whether the improper argument was of such a character as was likely to prejudice the defendant, and if so, was the verdict so clearly right that a new trial ought not to be granted because of such prejudicial argument."

In *Chicago and Alton Railroad Co. v. Scott*, 232 Ill. 419, counsel for the plaintiff indulged in inflammatory language against the railroad company calculated to prejudice the jury. The trial court sustained the objections thereto. It was held there that the sustaining of the objections under the circumstances in that case did not excuse the error. This court there said: "A court owes a duty of protection to witnesses and parties, and especially to witnesses, and hearing an attorney, under the guise of argument, abusing his privilege, should, either upon objection or its own motion, check the attorney, and not only do that but preserve the dignity of the court by compelling obedience to its order. (2 Ency. of Pl. & Pr. 750.) It is the duty of a court to preserve its own dignity and the respect due to the courts and the administration of the law by not allowing an attorney, under the pretense of arguing the case, to indulge in abuse of parties or witnesses. (*City of Salem v. Webster*, 192 Ill. 369.) The power vested in the court should

have been promptly used in this case at the outset by stopping the line of argument upon which the attorney had entered and endeavoring to remove the prejudices excited by his language. The court failed in its duty, and the mere sustaining of objections was no adequate remedy for the evil done. As was said by the Supreme Court of Wisconsin in the case of *Sullivan v. Collins*, 107 Wis. 291: "The least that a self-respecting court can do under such circumstances is to stop such practice in the presence of the jury and not allow it to proceed with simply a perfunctory sustaining of objections.'"

In *Chicago Union Traction Co. v. Lauth*, *supra*, it was said: "The rule is, that although the trial court may have done its full duty in its supervision of the trial and in sustaining objections, a new trial should be granted where it appears that the abuse of argument has worked an injustice to one of the parties."

While it is true that at times, in closely contested cases, counsel may inadvertently say that which is prejudicial, the influence of such a statement may generally be overcome by sustaining objections thereto and by retraction on the part of offending counsel made in good faith, yet where it would appear, as it does here by frequent instances, that counsel has in the presence of the jury indulged in acts and statements prejudicial to the rights of the opposite party, and which tend to indicate that he was seeking what might be gained from such prejudice of the jury, such misconduct will amount to a mis-trial of the cause, unless it can be seen that it did not result in injury to the plaintiff in error. We cannot so hold here. The evidence was conflicting and the verdict returned was for a large sum. While it is unfortunate that this case must be reversed for these reasons, yet it is a misfortune visited upon defendant in error by his own attorney. When intelligent counsel persists in conduct which he knows may result in setting aside the verdict of the jury if he secure one, he is thereby deliberately tak-

ing chances with his client's rights. As was said in *Bale v. Chicago Junction Railway Co.* 259 Ill. 476, where prejudicial remarks were made, objected to and objection sustained: "This kind of argument cannot be justified, and if willfully persisted in will justify the reversal of a judgment even though the court has sustained objections to it. It is, of itself, sufficient reason for granting a new trial." It appears that this is not the first instance in which this court has been compelled to criticise the conduct of counsel for defendant in error. In the case of *Kenna v. Calumet, Hammond and Southeastern Railroad Co.* 284 Ill. 301, said counsel's conduct was held grossly improper. As objecting counsel had likewise indulged in improper conduct, that complained of did not there work a reversal of the case. There appears to be no evidence in the record of any improper conduct on the part of counsel for plaintiff in error and none is charged. While it is regrettable that this case must be reversed because of improper conduct of intelligent and able counsel, yet if courts of law are to be sources of justice, the rule that parties litigant, regardless of who they may be, shall have secured to them the opportunity to have the issues of their case tried by a jury free from the prejudicial influence of improper conduct of counsel must be strictly enforced.

It is also contended that the evidence is such as to establish that the deceased, as a matter of law, assumed the risk of the injury he received, and that the evidence is likewise such as to show contributory negligence, as a matter of law, on the part of the deceased to the extent of one hundred per cent. As this case must be re-tried it would not be proper for us to discuss the evidence in the record.

The judgments of the Appellate and superior courts will be reversed and the cause remanded to the superior court of Cook county.

Reversed and remanded.

(No. 12610.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. MARK P. BRANSFIELD *et al.* Plaintiffs in Error.

Opinion filed June 18, 1919—Rehearing denied October 9, 1919.

1. CRIMINAL LAW—*what is not an unlawful seizure of the defendant's books of account.* Where defendants to a charge of embezzling the funds of a bank were co-partners in the real estate business and kept books of account, in which, as officers of the bank, they also kept items of account in the bank business, it is not a violation of the fourth amendment to the Federal constitution to grant a petition of the State's attorney to have the books of account turned over to him by a bankruptcy court, which was settling up the affairs of the partnership.

2. SAME—*the defendants are not protected from introduction of books of account to which they are no longer entitled.* Where officers of a bank are being tried for embezzling its funds the People may introduce in evidence books of account used by the defendants in a real estate business, in which they also kept certain accounts of the bank, and which they had surrendered to a bankruptcy court in a proceeding from which they did not appeal, as the title to the books is no longer in the defendants but in the trustee in bankruptcy.

3. SAME—*when evidence is sufficient to show defendant was an officer of a bank.* A defendant who, with others, is charged with embezzling the funds of a bank under sections 75 and 76 of the Criminal Code, is sufficiently shown to be an officer or agent of the bank where there is evidence that he acted as assistant cashier and signed his name as such and the testimony of at least one witness that he was assistant cashier.

4. SAME—*when party is guilty as a principal.* One who stands by and aids and abets in the commission of a crime is guilty as a principal; and this rule applies to the assistant cashier of a bank who knowingly participates in the fraudulent transactions carried on by the bank.

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. GEORGE KERSTEN, Judge, presiding.

TIMOTHY J. FELL, for plaintiffs in error.

EDWARD J. BRUNDAGE, Attorney General, MACLAY HOYNE, State's Attorney, and EDWARD C. FITCH, (EDWARD E. WILSON, and GROVER C. NIEMEYER, of counsel,) for the People.

Mr. JUSTICE STONE delivered the opinion of the court:

The plaintiffs in error were indicted for embezzlement by the grand jury of Cook county on April 16, 1918. The indictment consisted of two counts. The first count is based on section 75 of the Criminal Code, and alleges that on the 19th day of May, 1917, the Auburn State Bank of Chicago was a banking corporation; that Thomas F. McFarland was at that time the president of said bank; that Mark P. Bransfield was the vice-president and cashier of the bank; that William J. Cline was an officer, agent and servant of the bank, to-wit, assistant cashier, and performed the duties of assistant cashier of the bank; that all of the parties on the 19th day of May, 1917, embezzled the property and funds of the bank in the sum of \$275,000. The second count of the indictment is based on section 76 of the Criminal Code, and charges that the Auburn State Bank was a corporation engaged in the banking business May 19, 1917, and that Thomas F. McFarland was then the president of said bank; that Mark P. Bransfield was then vice-president and cashier of the bank, and that William J. Cline was then an officer, agent and servant of the bank, to-wit, assistant cashier, and that he acted as and performed the duties of assistant cashier of the bank; that the plaintiffs in error then were officers, agents, servants and employees in the employ of said bank and on May 19, 1917, embezzled a large amount of personal goods, funds, money and property, set out in the indictment in the usual description of currency as found in the first count of the indictment. On motion of the plaintiffs in error a bill of particulars was filed. Thereafter the motion of plaintiffs in error to quash the indictment, and each count thereof, was

heard and overruled. Thereupon each of the plaintiffs in error pleaded not guilty. A trial of the cause was had, and the jury found each of plaintiffs in error guilty as charged in the indictment and found the value of the property embezzled and stolen by each to be \$275,000. Motions for a new trial and in arrest of judgment were entered on behalf of plaintiffs in error and overruled and they were sentenced to the penitentiary as provided by law. The bank was closed as insolvent by the State Auditor on May 22, 1917.

Prior to and at the time of the commission of the alleged crime charged in the indictment Thomas F. McFarland and Mark P. Bransfield were engaged in the real estate and loan business. They had offices adjoining the Auburn State Bank. They kept a complete set of books in connection with their real estate and loan business. In these books appeared many items of accounts which the evidence showed were rightfully and in fact accounts of said bank and not of said partnership. On May 25, 1917, after the indictment in question had been returned, an involuntary petition in bankruptcy was filed against them in the United States district court. At that time their co-partnership books and papers were in their possession and so remained until June 15, 1917. Upon application by the receiver in bankruptcy to the United States district court an order was entered directing them to immediately turn over and deliver to the receiver all the partnership books, records, etc. The application for this order was resisted by each of them, and they refused to deliver their said co-partnership books to the receiver for the reason that they were then under arrest on criminal charges preferred against them by the State's attorney of Cook county charging each of them with divers offenses, among which was the offense of embezzlement, and urged before the United States district court that if so delivered their partnership books might be used against each as evidence in the criminal case then pending, contrary to the provisions of the constitution of

the United States and the constitution and bill of rights of the State of Illinois. Upon hearing in the United States district court an order was entered providing that they immediately deliver to the receiver all books of account, files, records and documents relating to their business, and that the receiver shall use them, or permit any other person to use them, only for the civil administration of the estate of the bankrupts; that the receiver should not part with the books of account, etc., until the bankrupts had an opportunity to question their constitutional privilege in the same manner as if the books of account, etc., had remained in the possession of the bankrupts. Later the Greenebaum Sons Bank and Trust Company, which had been acting as receiver, was appointed trustee in bankruptcy. No other or further order was entered in the bankruptcy proceedings in the foregoing matter.

On February 27, 1918, the State's attorney of Cook county filed a petition in the bankruptcy proceedings stating that there were then pending in the criminal court of Cook county indictments against Mark P. Bransfield, Thomas F. McFarland and William J. Cline, charging them, as officers of the Auburn State Bank of Chicago, with receiving deposits with knowledge on the part of each of them that the bank was insolvent, and that there was also pending another case charging each of the defendants with embezzlement; that said causes were being prepared for trial by the State's attorney, and that the books, records, etc., pertaining to the Auburn State Bank were then in the possession of the State's attorney and were being examined preparatory to such trial; that the affairs and transactions of the bank were confused with the business affairs and transactions of the co-partnership of Bransfield & McFarland; that various items and accounts of transactions with divers persons doing business with the Auburn State Bank were carried upon the books and among records, papers, etc., of Bransfield & McFarland; that it was essen-

tial that the books and records of the co-partnership be introduced and used on the trial of the causes then pending in the criminal court, and prayed for an order for leave to obtain the books, records and papers of the co-partnership for said use. The plaintiffs in error Bransfield and McFarland resisted said petition on the ground that the books, records and papers of the co-partnership had been by them turned over under an order of the United States district court, to be used only for civil administration of the estate of the bankrupts; that the proposed use by the State's attorney would be a violation of their constitutional rights and in effect compel them to furnish evidence that might tend to incriminate them. On March 5, 1918, the United States district court entered an order granting leave to the trustee in bankruptcy to turn over and deliver the books, records and files of the co-partnership to the State's attorney for examination, and granted leave to the trustee to comply with any subpoena that might issue out of the criminal court of Cook county for the production of the books and records. On the trial in this case a motion was made to preclude the State's attorney from introducing the books and records in evidence on the foregoing grounds. This motion was denied by the trial court. At the conclusion of all of the evidence a motion was made to exclude the evidence of the co-partnership matters and the testimony of all witnesses relating to the entries in said records, which was overruled.

It is contended by the plaintiffs in error that the introduction of the evidence objected to constitutes reversible error; that to permit the introduction of the books in evidence was a violation of the fourth amendment to the constitution of the United States, which declares: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." It is also contended that the use of said books in evidence against the plaintiffs in error was, in ef-

fect, compelling the plaintiffs in error Bransfield and McFarland to be witnesses against themselves, contrary to the fifth amendment of the Federal constitution, which provides: "No person * * * shall be compelled, in any criminal case, to be a witness against himself." As we have seen, the books of the partnership were lawfully in the hands of the trustee in bankruptcy by an order of the bankruptcy court at the time they were by that court ordered to be turned over to the State's attorney. It follows that there was no search or seizure as contemplated by the fifth amendment of the Federal constitution, and said amendment was not violated.

It is, however, earnestly urged that the use of the partnership books in the trial of this cause compelled plaintiffs in error Bransfield and McFarland to be witnesses against themselves. These books had in them many accounts which, the facts showed, in reality belonged to the bank, so that it might well be doubted whether they were the private books of the partnership as to such accounts. However that may be, the books were legally in the hands of the trustee in bankruptcy. Plaintiffs in error had parted with possession of said books, and, while it was over their protest, the receiver was by the finding of the bankruptcy court, which was not appealed from, entitled to the books, and the property right therein became vested in the receiver and later in the trustee. This ruling is well sustained in the case of *In re Harris*, 221 U. S. 274, where the court said: "The question is not of testimony but of surrender; not of compelling the bankrupt to be a witness against himself in a criminal case, present or future, but of compelling him to yield possession of property that he no longer is entitled to keep. If a trustee had been appointed, the title to the books would have vested in him by the express terms of section 70, and the bankrupt could not have withheld possession of what he no longer owned, on the ground that otherwise he might be punished. That is one of the mis-

fortunes of bankruptcy if it follows crime. The right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story. As the bankruptcy court could have enforced title in favor of the trustee it could enforce possession *ad interim* in favor of the receiver." Again, it was said by the court in *Johnson v. United States*, 228 U. S. 457: "A party is privileged from producing the evidence but not from its production. The transfer by bankruptcy is no different from a transfer by execution of a volume with a confession written on the fly-leaf. It is held that a criminal cannot protect himself by getting the legal title to corporate books. (*Wheeler v. United States*, 226 U. S. 478; 57 L. ed.; 33 Sup. Ct. Rep. 158.) But the converse proposition is by no means true, that he may keep the protection from the introduction of documentary evidence that he would have had while he retained it, after the title and possession have gone to someone else. It is true that the transfer of the books may have been against the defendant's will, but it is compelled by the law as a necessary incident to the distribution of his property,—not in order to obtain criminal evidence against him. Of course, a man cannot protect his property from being used to pay his debts by attaching to it a disclosure of crime. If the documentary confession comes to a third hand *alio intuitu*, as this did, the use of it in court does not compel the defendant to be a witness against himself." It follows from these decisions that there was no violation of said amendment in admitting the books of the partnership. Such is likewise the rule as announced by this court. *People v. Munday*, 280 Ill. 32; *People v. Hartenbower*, 283 id. 591.

It is also contended by the plaintiffs in error that the trial court erred in admitting testimony relating to separate and distinct offenses not mentioned in the bill of particulars without limiting such admission to the purpose of showing criminal intent. The evidence complained of was compe-

tent for the purpose of showing criminal intent. There appears to have been no request to have the effect of it limited to that purpose, nor was an instruction asked by plaintiffs in error so limiting the effect of such testimony to the jury.

It is also contended that there is no evidence in the record directly or indirectly connecting plaintiff in error William J. Cline with any of the transactions mentioned in the bill of particulars, and that there is no proof in the record that Cline was ever appointed or elected assistant cashier of the Auburn State Bank. The evidence shows that he receipted for a mortgage known as the Peter Foley note, for \$4500, itemized in the bill of particulars, and that that mortgage was never returned to its rightful owner. It also appears from the evidence that he signed, as assistant cashier, different false reports to the State Auditor as to the condition of the bank. It is a well known rule of law that one who stands by and aids and abets in the commission of a crime is guilty as principal. It also appears from the evidence that Cline knew of the various fraudulent transactions of Bransfield & McFarland; that he transferred on the books of the bank the account of the Commercial National Fire Insurance Company, the Insurance Exchange of Members of the National Retail Dry Goods Association, and others, to the accounts of Bransfield & McFarland; also that he assisted in handling transactions in the bank through the use of forged and fraudulent notes, including indorsements and payments of like character in connection therewith. These are but instances of his connection with the fraudulent transactions carried on in the bank which make it impossible to conceive of his not being conversant with what was going on. In fact, it would not seem possible for these transactions to have been carried on without his knowledge and assistance. We are of the opinion that the jury were justified in finding plaintiff in error Cline guilty. There is ample evidence in the record to establish

that he was acting in the capacity of assistant cashier of the bank. By sections 75 and 76 of the Criminal Code it is provided that the offenses in said sections described, and which are charged in the indictment herein, may be committed by officers, agents, clerks or servants of a corporation or banking corporation. The evidence that Cline was acting as assistant cashier in the bank, that he signed his name as such, and the testimony of at least one witness in the record stating that he was such assistant cashier, is sufficient to satisfy the requirements of sections 75 and 76.

It is also contended on behalf of plaintiffs in error that the court erred in not quashing the indictment on the ground that it failed to set forth the ownership of the treasury notes, bank bills or coin described in the indictment. This contention is without merit. The reading of the indictment is sufficient to show that the allegation of the ownership refers to the sundry current bank bills, currency, treasury notes and coin described in the indictment as well as to notes, checks and orders for the payment of money therein referred to.

It is also complained that the court erred in giving certain instructions. We have examined these instructions and find no reversible error therein.

There is no contention that the verdict is not sustained by the evidence or that the plaintiffs in error are not guilty. The assignments of error all relate to matters occurring in the conduct of the trial. The plaintiffs in error were proven guilty beyond all reasonable doubt, and on examination of the entire record we are of the opinion that there was no reversible error therein.

The judgment of the criminal court of Cook county will therefore be affirmed.

Judgment affirmed.

(No. 12324.—Reversed and remanded.)

THE INDIANA HARBOR BELT RAILROAD COMPANY, Appellee, vs. T. F. GREEN *et al.* Appellants.

Opinion filed June 18, 1919—Rehearing denied October 9, 1919.

1. NEW TRIAL—*a new trial is a de novo hearing.* A new trial is a *de novo* hearing, and admissions or waivers as to questions of jurisdiction of the subject matter, made for the purposes of the first trial, are not binding upon a new trial of the cause.

2. RAILROADS—*a foreign inter-State railroad corporation must comply with foreign Corporations act.* Because a foreign railroad corporation is engaged in inter-State commerce does not relieve it of the obligation to comply with the Foreign Corporations act of 1905 before it can operate in Illinois.

3. SAME—*foreign railroad corporation operating under act of 1899 must comply with act of 1905.* A foreign railroad corporation operating under the act of 1899 for the purchase of railroads by foreign corporations, in addition to compliance with that act must comply with the provisions of the Foreign Corporations act of 1905 when it seeks to do business in Illinois subsequent to the passage of the act of 1905.

4. SAME—*foreign railroad corporation's petition for condemnation must show compliance with laws of Illinois.* Before a foreign railroad corporation can condemn land in Illinois it is jurisdictional that its petition for condemnation show compliance with the laws of Illinois authorizing it to operate in this State.

5. CORPORATIONS—*a foreign corporation must comply with conditions for transacting business before bringing action in Illinois.* The legislature has power to impose such conditions on foreign corporations for the exercise of powers or privileges in Illinois as it may choose, and a foreign corporation which has not complied with the conditions prescribed for transacting business in Illinois cannot maintain an action in the courts of the State.

6. EMINENT DOMAIN—*petition must show right to condemnation.* As the right to condemn land is in derogation of the common right of the individual to be secure in the possession of his property, a petition for condemnation must specifically set forth the right of the petitioner.

7. SAME—*right of condemnation is based on public interest and convenience.* The taking of private property by the exercise of eminent domain is a right given to public and quasi public corpo-

rations, and is based upon the necessity for the assertion either of the governmental powers or the right to develop an agency in which the public has an interest in order that the public convenience may be served.

APPEAL from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding.

ASHCRAFT & ASHCRAFT, (E. M. ASHCRAFT, of counsel,) for appellants.

GLENNON, CARY, WALKER & HOWE, (BERTRAND WALKER, and F. HAROLD SCHMITT, of counsel,) for appellee.

Mr. JUSTICE STONE delivered the opinion of the court:

This cause is brought to this court by appeal from a judgment in condemnation proceedings under the Eminent Domain act.

The petition of the appellee filed in the trial court avers that it is, and for twenty years has been, a railroad corporation organized and existing under and by virtue of the laws of the State of Indiana; that under the Railroad act and under its charter it was empowered to extend its railroad into the State of Illinois; that an agreement was entered into between it and the Chicago Junction Railway Company and other corporations, under date of June 29, 1907, whereby the Chicago Junction Railway Company, an Illinois corporation, transferred to the petitioner the possession of that part of its line of railroad extending from Franklin Park, in Cook county, Illinois, to McCook, in said county, and from Blue Island, in said county, to Hammond, in Lake county, Indiana, and granted to petitioner the right to enter upon, hold, occupy, maintain, manage and operate the same for a period of four months from July 1, 1907; that on October 31, 1907, by virtue of an act of the legisla-

ture of the State of Illinois authorizing sales and transfers of railroads, toll bridges and other property and franchises, approved April 21, 1899, it purchased from the Chicago Junction Railway Company and by appropriate deeds of transfer acquired title to certain lines of railroad belonging to the Chicago Junction Railway Company, extending from Franklin Park to McCook, in Cook county, and from Blue Island, in Cook county, to Hammond, in Lake county, Indiana, together with other lines of railroad; that under and by virtue of the Eminent Domain act of Illinois and said act of 1899 the petitioner had the right to have and operate its railroad in Illinois and to acquire by eminent domain, land and property needed for said railroad, including depot grounds, yards, tracks, side-tracks, etc., and for any other lawful purpose connected with or necessary to the operating or maintaining of said road; that the railroad belonging to and operated by the petitioner as a public or common carrier of freight, extends from various points in Lake county, Indiana, through said State into the State of Illinois; that it has located the yards, depot, depot grounds, tracks, side-tracks and connecting tracks of its road in the town of Proviso, in Cook county, Illinois, and that it is necessary for petitioner to acquire the land described in said petition, to be held and used for the purposes aforesaid; that under and by virtue of certain acts referred to in said petition the petitioner is authorized to acquire, hold and use the land for said purposes; that compensation to be paid for the land thus needed cannot be agreed upon by petitioner and the owners thereof, and the same cannot be acquired by purchase or otherwise. The petition sets forth the description of the land and the owners thereof, and makes said owners parties defendant and prays for process.

Before entering upon the trial the defendants filed their petition asking the court to fix and ascertain in said condemnation proceedings the amount of damages, due to such

proposed construction, to lands not taken or sought. A trial was had before a jury. The jury returned a verdict for \$1200 for the land taken and \$800 for damages to land not taken. A motion for a new trial was granted and the cause was continued to March 18, 1918. The defendants, before entering upon the second trial, filed their motion, supported by an affidavit, for leave to withdraw their cross-petition filed in said cause for damages to land not taken, and to dismiss the petition of the appellee on the ground that the petition does not contain averments necessary to give jurisdiction to the court to hear the same; that the petition fails to show any right to bring or maintain condemnation proceedings; that the petition shows that the petitioner is a foreign corporation which has not complied with the laws of the State of Illinois permitting it to bring or maintain any action or do any business in the State of Illinois; that it is a fact that the petitioner is a foreign corporation and has been doing business as a corporation in the State of Illinois for a period of at least five years without qualifying, as required by the statutes of the State of Illinois, before filing the petition herein; that the petitioner has acquired parallel and competing lines of railroad and is operating the same contrary to our statutes; that at the time of the alleged purchase by the petitioner it was not authorized by its charter to, nor did it in fact, own or operate a railroad to the State line of the State of Illinois, connecting with the lines of road alleged in the petition to have been purchased. This motion was overruled by the court and a second trial was had before a jury. The jury returned a verdict fixing the compensation to be paid the appellants for the land taken at \$1200 and for land not taken at \$1000. Motions for a new trial and in arrest of judgment were overruled and judgment on the verdict entered for the above amounts and costs. Exceptions were taken to the rulings of the court and an appeal perfected to this court.

The only matters preserved in the bill of exceptions for review are the motion to withdraw suggestions for damages for land not taken and to strike the petition from the files, and the motion for new trial and in arrest of judgment.

It is contended by the appellants that the petitioner must show, by facts set forth in the petition, that it is a railroad under the laws of the State of Illinois; that the statute provides what facts must appear in the petition to condemn, and unless such facts are alleged in the petition the court is without jurisdiction to hear it; that the petitioner is a foreign corporation and has failed to comply with the Foreign Corporations act of Illinois enacted in 1905, and is without authority to proceed under the Eminent Domain act. It is contended by the appellee that the defendants have waived their right to assign said errors by proceeding to the first trial of this cause without raising the questions assigned as error, and that the granting of a new trial does not re-open the cause for a consideration of the questions thus waived; that the filing of the cross-petition and the introduction of evidence in support of the same by the defendants is an admission that the petitioner had a right to condemn the land in question; that the petitioner is a railroad corporation engaged in inter-State commerce, organized under the laws of the State of Indiana, and qualified under said laws, as well as the laws of the State of Illinois, to own and operate the railroad referred to in the petition, and for that reason it has the authority of a foreign corporation to condemn the land in question under the Eminent Domain act.

The first question to be determined is whether or not appellants have waived their right to question the jurisdiction of the court by going to trial on the first trial without raising the above question or by not abiding their motion made before the second trial to dismiss the petition. A new trial is a *de novo* hearing. Admissions or waivers as to questions of jurisdiction of the subject matter, made for the

purposes of the first trial, are not binding upon a new trial of the cause. (29 Cyc. 1034.) Appellants interposed a motion to withdraw their cross-petition for damages and to dismiss the petition prior to the commencement of the second trial. This motion was overruled. Appellants on their motion to dismiss raised the issue before the court concerning the right of appellee to condemn, averring that the petition did not show, and the facts would not show, that appellee had complied with the Foreign Corporations act of 1905, to which appellee replied that the act of 1905 does not apply for the reason that appellee is engaged in inter-State commerce, and for the further reason that it is operating under the act of 1899 and therefore not required to comply with the act of 1905. To hold that the fact, if it be a fact, that appellee is engaged in inter-State commerce and therefore under no obligation to comply with the Foreign Corporations act of this State, is, in effect, to hold that there can be no such thing as a foreign corporations law as applied to railroads. Such is not the law and appellee cites no authority supporting such a contention.

Section 1 of the act entitled "An act to regulate the admission of foreign corporations for profit, to do business in the State of Illinois," approved May 18, 1905, provides: "That before any foreign corporation for profit shall be permitted or allowed to transact any business, or exercise any of its corporate powers in the State of Illinois, other than insurance companies, building and loan companies and surety companies, they shall be required to comply with the provisions of this act and shall be subject to all of the regulations prescribed herein, as well as all other regulations, limitations and restrictions applying to corporations of like character organized under the laws of this State." Section 7 of the act provides: "This act shall not be construed to repeal any law now in force regulating the admission into this State of any insurance, surety, building and loan, railroad or telegraph corporation, but the provi-

sions of this act shall be construed to be additional to any provisions, regulating the admission of any such foreign corporations to do business in the State of Illinois." Section 9 of the act also provides: "This act shall not be applicable to, or in any manner affect, any corporation of another State which has acquired, or constructed, and is now operating, a railroad in the State of Illinois."

The act of 1899 is entitled "An act concerning the rights, powers and duties of certain corporations therein mentioned, authorizing the sale and transfer of any railroad, or railroad and toll bridge, and other property, franchises, immunities, rights, powers and privileges connected therewith or in respect thereto, of any corporation of this State, to a corporation of another State, and prescribing the rights, powers, duties and obligations of the purchasing company," approved April 21, 1899. Said act provides, in effect, that whenever a corporation of another State shall be in possession of a railroad belonging to a corporation in this State or shall own or control all the capital stock of such corporation of this State, then said corporation of another State may purchase such railroad if it is not a parallel or competing line, provided the sale is approved by two-thirds of the stockholders of both companies, and may operate the same and enjoy the power of eminent domain and other powers, subject to the laws of this State for the regulation, government, taxation or control of railroads of this State. This act presupposes by the language "whenever a corporation of another State shall be in possession of a railroad in this State," that that possession is held legally under the laws of this State relating to foreign railroad corporations. Section 7 of the act of 1905, which was passed before appellee here acquired possession of the Illinois railroad and before any rights had accrued to appellee, specifically says that said act shall be construed as an additional requirement to admission of any foreign corporation. This is the effect of said act. This court has uni-

formly held that a foreign corporation which has not complied with the conditions prescribed for transacting business in this State cannot maintain an action in the courts of the State. (*Cincinnati Mutual Health Assurance Co. v. Rosenthal*, 55 Ill. 85; *Supreme Sitting Order of Iron Hall v. Grigsby*, 178 id. 57; *Thompson Co. v. Whitehead*, 185 id. 454.) The legislature has power to impose such conditions upon foreign corporations for the exercise of powers or privileges in this State as it may choose, and such conditions must be complied with. *Illinois Trust Co. v. St. Louis, Iron Mountain and Southern Railway Co.* 208 Ill. 419.

Appellee sought to do business in this State after the passage of the act of 1905 and was subject to it, and its petition should have shown compliance therewith. This is jurisdictional. Appellee in its petition to condemn makes no averment of such compliance. Its charter was issued under the laws of Indiana. What powers were by them granted is not material here, as laws are not extra-territorial in their application or force, and appellee, in order to condemn land in the State of Illinois, must by its petition show itself empowered so to do under and by virtue of the laws of the State of Illinois. As was said in *People v. Wayman*, 256 Ill. 151: "The charter privileges, powers and obligations of the consolidated corporation were prescribed and limited by the laws of this State. (*Ohio and Mississippi Railway Co. v. People*, 123 Ill. 467.) The laws of the several States have no extra-territorial force, and the provision conferring upon the corporation organized under the act of 1861 the powers possessed by the consolidated corporation did not purport to, and could not, fix the term of the corporate existence." So in *Illinois Trust Co. v. St. Louis, Iron Mountain and Southern Railway Co. supra*, it was said: "The petitioner can have no legal existence in this State outside of the boundaries of the States where it was incorporated, and can exercise none of the powers conferred by its charter except by consent of the legislature

of this State. It is competent for the legislature to delegate the exercise of the power of eminent domain to a foreign corporation, but the power can only be exercised when so granted. The power to take the property of the individual without his consent is against common right, and all acts authorizing such a taking are to be strictly construed. (*Chicago and Eastern Illinois Railroad Co. v. Wiltse*, 116 Ill. 449; *Chicago and Northwestern Railway Co. v. Galt*, 133 id. 657.) Unless both the letter and the spirit of the statute relied upon clearly confer the power it cannot be exercised. (*Ligare v. City of Chicago*, 139 Ill. 46.) The question under what conditions the power shall be exercised is purely legislative, but it is the duty of the court, when called upon, to decide whether the statutory conditions exist and whether the taking of the property is within the statutory power conferred.—*Harvey v. Aurora and Geneva Railway Co.* 174 Ill. 295."

It has been frequently held in this State that a petition to condemn land must specifically set forth the power of the petitioner so to do. The taking of private property by the exercise of eminent domain is a right given to public or *quasi* public corporations and is based upon the necessity for the assertion either of governmental powers or the power to develop an agency in which the public has an interest, in order that the public convenience may be served. Such right is nevertheless in derogation of the common right of the individual to be secure in the possession of his property. The power to compel an individual to give up his property against his will, for a consideration which must be fixed by the courts, is one which is in its nature against the common right. All rights given by law which are in derogation of the common right must be construed strictly, and a petition for the assertion of that right must set forth all of the averments necessary to authorize the court to act in such proceeding. *Reed v. Ohio and Mississippi Railway Co.* 126 Ill. 48; *Chicago and Northwest-*

ern Railway Co. v. Galt, supra; Harvey v. Aurora and Geneva Railway Co. supra; Hutchins v. Vandalia Levee District, 217 Ill. 561.

For the reasons herein indicated the petition in this case was defective and did not confer jurisdiction on the court to try the cause, and the circuit court therefore erred in refusing to sustain the motion of the appellants.

The judgment of the circuit court will therefore be reversed and the cause remanded for further proceedings not inconsistent with this opinion. *Reversed and remanded.*

(No. 12704.—Decree affirmed.)

GEORGE W. THRELKELD *et al.* Appellants, *vs.* A. J. INGLETT
et al. Appellees.

Opinion filed June 18, 1919—Rehearing denied October 10, 1919.

1. **SPECIFIC PERFORMANCE**—*options for purchase of coal rights may be enforced.* Taking options for the purchase of coal, oil and gas underlying certain land is a legitimate business transaction, and the fact that the holders of the options do not intend to accept them unless the minerals are found and can be disposed of with profit does not affect their rights.

2. **SAME**—*option contract without consideration is only a continuing offer.* Although an option contract for the purchase of coal rights in land recites a consideration of one dollar, if no consideration is in fact paid the option amounts only to a continuing offer of sale during the time of the option and may be withdrawn, upon notice, at any time before acceptance.

3. **SAME**—*when sale to another party does not amount to notice of withdrawal of option.* Where the owner of land gives to certain parties an eighteen months' option to purchase the coal, oil and gas underlying the land, knowing that the parties must interest some coal company in the proposition before they will accept the option, such parties are entitled to notice of a withdrawal of the option before the eighteen months have expired though they paid no consideration, and a mere sale by the owner to another party does not take the place of such notice.

4. **SAME**—*when option for purchase of coal rights is not within rule against perpetuities.* A provision in an eighteen months' option for the purchase of the coal, oil and gas underlying certain

land, that the deed, when made, shall make provision for taking such portion of the surface of the land as is necessary for the purpose of the mining rights conveyed and fixing the price per acre for the land so taken, is not in violation of the rule against perpetuities, as authorizing the purchase of real estate at any time in the future.

5. *SAME—contract must be certain in all its provisions before the court will decree specific performance.* To entitle a party to specific performance of a contract it must be so certain in all its parts that the court can require performance of the specific thing contracted to be done, and if an option contract for the purchase of the coal, oil and gas underlying certain land is uncertain as to what provisions shall be inserted in the conveyance and such uncertainty is not removed by proof or waiver, the court cannot specifically enforce the contract.

6. *DEEDS—what is included in a conveyance.* Where a grant is made for a valuable consideration it is presumed that the grantor intended to convey and the grantee expected to receive the full benefit of it, and the grantor conveys not only the thing specifically described, but all other things, so far as it is within his power to pass them, which are necessary to the enjoyment of the thing granted.

7. *SAME—conveyance of coal, oil and gas carries right to use necessary parts of surface.* A conveyance of coal, oil and gas, with the right to mine and remove the same, carries with it the right to enter upon and use so much of the surface of the land as may be necessary to the enjoyment of the property and rights conveyed.

APPEAL from the Circuit Court of Jefferson county; the Hon. CHARLES H. MILLER, Judge, presiding.

NOLEMAN & SMITH, for appellants.

G. GALE GILBERT, ROBERT M. FARTHING, WALTER W. WILLIAMS, THURLOW G. LEWIS, GEORGE C. COFFEY, and W. H. HART, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

In the summer and fall of the year 1917 the appellants, George W. Threlkeld, William H. Green, L. C. Morgan and Jerome Mannen, procured from various owners options for

the purchase of the coal, oil and gas underlying several thousand acres of land in the townships of Elk Prairie and Bald Hill, in Jefferson county. Their plan and effort were to secure options upon a connected body of land sufficient to justify some large coal corporation in taking over the property and mining rights if it was demonstrated by drilling there was coal of sufficient thickness and conditions for profitable mining. Among other options they took one on September 29, 1917, from the appellee A. J. Inglett, in which a consideration of one dollar was expressed, and by which he agreed, for the further consideration of \$25 per acre, to convey to appellants, their heirs or assigns, by warranty deed, including the release and waiver of dower and homestead rights, on or before eighteen months thereafter, the coal, oil and gas underlying his land, containing 320 acres, more or less, and to furnish appellants an abstract of title showing a good, clear and merchantable title, which the appellants were to have a reasonable time to examine after the exercise of the option. About twenty test drillings were made in the field covered by the options, which showed that the lands were underlaid with a vein of coal of suitable thickness and conditions for mining. The appellee the West Frankfort Coal Company invaded the field in which the appellants had operated and secured options from different owners of lands, telling them that the options given to the appellants were not worth anything and not valid and promising to protect the owners against any claim of the appellants. On June 4, 1918, the appellees other than Inglett induced Inglett to make a deed to the West Frankfort Coal Company for the coal, oil and gas underlying his land, and the deed was deposited in the bank, to remain there until the matters were settled. There is no evidence that they made any statement to Inglett about the previous option, but they had full knowledge of it, and when an attempt was made to enforce it they agreed to, and did, defend the cause for Inglett. The appellants had made an ar-

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rangement with the representative of large coal companies for taking the property and mining rights to be conveyed by the options they had secured, and on August 5, 1918, they served a written notice on Inglett accepting the option and notified him to deliver his warranty deed to the Jefferson State Bank of Mt. Vernon, together with an abstract of title. He acknowledged in writing the receipt of the notice, with a statement that he would deliver abstracts of title and deeds to the Jefferson bank at once. About a week after August 7, 1918, he served a written notice bearing that date on the appellants, stating that he had theretofore sold to the West Frankfort Coal Company the coal, oil, gas and other minerals underlying the surface of the land, and that the option given to the appellants had been determined and ended by him and was then void and of no force and effect. He refused to make a deed or deliver his abstract, and the appellants filed their bill in this case in the circuit court of Jefferson county against him and the West Frankfort Coal Company, Jesse Dimond, D. M. Parkhill and John D. Hiron, owners or agents of the West Frankfort Coal Company, praying for a specific performance of the option contract. The bill was answered with denials of practically everything averred, and the chancellor heard the cause and dismissed the bill for want of equity, at the costs of the appellants.

The lands were not correctly described in the option, and the bill prayed for a reformation conforming to the agreement. On that question there was no dispute and the appellants were entitled to the reformation prayed for.

It was argued with great vehemence at the bar that there was no equity in the bill because the appellants had not invested anything and did not intend to purchase the lands for themselves but were only promoters, obtaining options for the purpose of disposing of them at a profit if they were able to do so, and for that reason were not entitled to any consideration. Taking the options was a per-

fectly legitimate business transaction, and the fact that the appellants would only accept the options in case coal was found and they could dispose of them with a profit is of no importance whatever on the question of their rights.

It is also argued that the decree was right because the bill did not allege that the appellants were able to comply with the option on their part. The bill alleged that they were ready, willing and anxious to comply with the option and to pay for the property the consideration therein expressed, and they offered to purchase and to pay such consideration for the coal, gas and oil. They could not be ready without being able, and they offered to perform on their part. The bill was answered and no question was made of its sufficiency. The proof showed that the appellants were ready, able and willing to perform on their part, as they had offered to by the bill, and the objection is groundless.

It is further contended that the option was void because oil and gas not discovered and located are not the subject of a conveyance. That question has no relation to the coal, and in *Bruner v. Hicks*, 230 Ill. 536, it was held that a conveyance of gas and oil, with the right to prospect for and mine the same, gave a present vested right to go upon the land for the purpose of prospecting and mining and securing and marketing the oil when discovered. Whether oil and gas while in the earth are subject to a separate ownership from the surface or not would make no difference to the appellees. If a deed, when made, would convey nothing but the coal, that fact would concern only the appellants and not the appellees.

The option recited a consideration of one dollar, but no consideration was in fact paid, so that the option was subject to be withdrawn at any time before acceptance and amounted only to a continuing offer of sale during the eighteen months after it was made. If a consideration for an option is paid and a time fixed for the exercise of the option it cannot be withdrawn during that period, but if

there is no consideration it may be withdrawn upon notice given before acceptance. A contract is not complete without the mutual assent of the parties, and so long as the option remains open it imposes no obligation upon either party, but if accepted before withdrawn the offer is changed into a binding promise. (*Carter v. Love*, 206 Ill. 310; 6 R. C. L. 604; 13 Corpus Juris, 293.) No notice was given to the appellants of the withdrawal of the offer, and there are some cases holding that a sale to another person of real property covered by an option amounts to a revocation. *Dickinson v. Dodge*, L. R. 2 Ch. Div. 463, is one of those cases where an offer was to be left open until Friday at nine o'clock A. M., and before the expiration of the time the property was sold to another. That case was cited by this court in *McCauley v. Coe*, 150 Ill. 311, on the right of withdrawal before acceptance, but the decision that a conveyance to another without notice was a withdrawal had nothing to do with the case in which it was cited. In that case premises were leased for one year with an option to purchase on full payment of the rent reserved, and a further sum, with interest, at certain specified dates. It was held that the option was more than a mere offer of the lessor which he was at liberty to withdraw at any time before acceptance but was based on a valuable and sufficient consideration. The payments were not made and the lease was surrendered and the landlord took possession. Neither the lessee nor those claiming under him accepted the offer or did any act evidencing an intention to accept it for nearly three and a half years after the termination of the option. The lease had been surrendered and the landlord had taken possession and there was no remaining right to accept the option. The case of *Warren v. Richmond*, 53 Ill. 52, does not tend to sustain the claim of appellees. That was a bill for the specific performance of a contract for the conveyance of real estate where time was of the essence of the contract. The purchase money was not paid and the origi-

nal agreement was canceled and abandoned, and it was said that if a declaration of forfeiture was necessary, the conveyance to another was a sufficient declaration. *Bostwick v. Hess*, 80 Ill. 138, was also a case where the payment of the purchase money within a specified time was of the essence of the contract and non-compliance with the condition was a forfeiture of any right under the contract. The sale of the land to another after the expiration of the time for payment was regarded as sufficient evidence of the forfeiture. All those cases were where the time allowed had expired, and nothing said in any of them applies to this case. Whether the rule claimed by appellees ought to be applied in any case, an application of it to the facts in this case, in which the purpose of the option and the understanding of the parties were that the appellants were to endeavor to put themselves in a position to accept the option by interesting some coal company and they were endeavoring to do so, would be so unjust that it cannot meet with our approval.

The option provided that the deed should make provision for taking such portion of the surface of the land as was necessary for the purpose of the mining rights conveyed, but the surface so selected should, when occupied, be paid for at the rate of \$150 per acre and the full cash value of permanent improvements, if any. It is contended that on account of this provision the contract was subject to the rule against perpetuities by giving the appellants the right to purchase so much of the surface as they might require at any time. It is true that an agreement to sell real estate at any time in the future when a party may choose to buy it is void for remoteness under the rule against perpetuities, but this contract was not of that nature. The conveyance was to be of the coal, oil and gas under the land, with the right to mine and remove the same, and when anything is granted, all the means to attain it and all the fruits and effects of it are granted also, and pass, together with

the grant of the thing itself, without any words to that effect. (Sheppard's Touchstone, 89; 2 Blackstone's Com. 36; 2 Washburn on Real Prop.—2d ed.—662; *Chicago, Rock Island and Pacific Railway Co. v. Smith*, 111 Ill. 363.) Where a grant is made for a valuable consideration it is presumed that the grantor intended to convey and the grantee expected to receive the full benefit of it, and therefore the grantor not only conveyed the thing specifically described, but all other things, so far as it was within his power to pass them, which were necessary to the enjoyment of the thing granted. The deed, when made, would not only pass the coal, oil and gas, with the right to mine and remove the same, but also the right to enter upon and use so much of the surface of the land as might be necessary to the enjoyment of the property and rights conveyed, and the agreement was merely that the land taken for such use should be paid for, when located, at the rate of \$150 an acre. It was not within the rule against perpetuities.

The option contained a provision that Inglett would give a deed containing provisions used for similar property in Franklin and Jefferson counties and also provisions satisfactory to the appellants. That was an agreement to make a deed, with provisions consistent with and within the general terms of the option, satisfactory to the appellants and in the form used for similar property in Franklin and Jefferson counties. Such an agreement could be made definite and certain by proof of a form of a deed containing provisions uniformly used in conveying coal, oil and gas in those counties. The appellants offered in evidence a blank form of deed which was in use in Franklin and Jefferson counties, but the evidence was that there was no established and uniform form of deed so used, and a great many deeds were offered in evidence by the appellees of different forms and containing different provisions. To entitle a party to specific performance of a contract it must be so certain and unambiguous in its terms and in all its parts that the court

can require the specific thing contracted for to be done. (*Hamilton v. Harvey*, 121 Ill. 469; *Koch v. National Union Building Ass'n*, 137 id. 497; *Tryce v. Dittus*, 199 id. 189; *Schenck v. Ballou*, 253 id. 415.) Contracts are continually made in which each party relies, as to details, upon the sincerity, honesty, integrity and personal character of the other party and his recognition of his obligation and willingness to perform his contract, and business, generally, could not be carried on and contracts made on any other basis; but if a party refuses to keep his obligation and perform his contract and specific performance is asked for, the court must be able to give to the complainant the specific thing contracted for. This is a case of that kind, where a party to a contract having the proper sense of business integrity and the obligation assumed could and would have performed the contract by making a deed within the terms of the option, but in which the court, for want of a definite statement of the provisions to be inserted in the conveyance, could not compel specific performance.

Counsel for appellants say that any further provisions in a deed from Inglett than those conveying by warranty deed the coal, oil and gas as specified in the contract could be waived by them, which is true, but there was no waiver. The bill set forth the option and prayed for a performance of it and that Inglett be required to execute a deed as provided in the option. The appellants did not in their written acceptance specify any form of deed but notified Inglett that they accepted the option under the terms and conditions of the same. The form of deed presented at the trial was not offered to Inglett at any time as the one with which appellants would be satisfied, and while a contract may be interpreted according to established and uniform usage, the evidence did not bring the form of deed or its provisions within that rule.

The decree is therefore affirmed.

Decree affirmed.

(No. 12681.—Judgment reversed.)

LILLIAN B. PEMBLETON, Appellee, vs. THE ILLINOIS COMMERCIAL MEN'S ASSOCIATION, Appellant.

Opinion filed June 18, 1919—Rehearing denied October 10, 1919.

1. JURISDICTION—*foreign judgment may be contradicted for the want of jurisdiction.* The record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction either as to the subject matter or the person, and if it be shown that such facts did not exist the record will be a nullity, notwithstanding it may recite that they did exist.

2. CORPORATIONS—*what necessary to give court jurisdiction in personam over foreign corporation.* To give a court jurisdiction in personam over a foreign corporation it must appear that the corporation was carrying on its business in the State where process was served on its agent, that the business was transacted by some agent appointed by or representing the corporation in such State, and that there was a local law in the State making such corporation amenable to suit there as a condition of doing business in the State.

3. SAME—*when soliciting business in State will not render foreign corporation subject to its jurisdiction.* The mere solicitation of business in a State by policyholders of a foreign insurance corporation is not such "doing business" within the State as to render the corporation subject to the jurisdiction of the State by service of process on a policyholder engaged in such soliciting.

4. SAME—*what necessary to render statute making solicitors agents of insurance companies applicable to foreign corporation.* Before a statute making solicitors of insurance business agents of the companies whose policies they sell can be applied to a foreign corporation it must be shown that the corporation was doing such business in the State as to be subject to its jurisdiction and laws.

5. STARE DECISIS—*when Federal Supreme Court must be followed to extent of overruling former decisions of the State court.* Decisions as to due process of law under the fourteenth amendment to the Federal constitution must be controlled by the decisions of the Federal courts rather than by the decisions of State courts, and if necessary the State Supreme Court will overrule its former decisions in such matters and follow the rule laid down by the Federal Supreme Court.

APPEAL from the Circuit Court of Cook county; the Hon. GEORGE F. BARRETT, Judge, presiding.

RYAN, CONDON & LIVINGSTON, (JAMES G. CONDON, and IRVIN I. LIVINGSTON, of counsel,) for appellant.

MUSGRAVE, OPPENHEIM & LEE, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was an action of debt in the circuit court of Cook county, brought on a foreign judgment entered in Nebraska, by appellee against the Illinois Commercial Men's Association, an Illinois mutual assessment accident insurance company, in reference to payment of an insurance policy taken out by appellee's husband. On the hearing in the circuit court judgment was entered against appellant, and this appeal followed.

The foreign judgment was entered by default on September 23, 1916, in the district court of Nebraska. Service of process in the Nebraska court on the appellant association was attempted to be made by serving, at Omaha, H. S. Weller, a policyholder of said association. It was argued in the circuit court, as it is here, that the judgment was entered without jurisdiction having been lawfully obtained over the appellant association, and therefore without due process of law and in violation of the fourteenth amendment of the Federal constitution.

The alleged cause of action upon which judgment was recovered in Nebraska arose out of and was based on a contract of accident insurance entered into between appellant, an Illinois corporation, and George G. Pembleton, a resident of Nebraska. It appears from the evidence that appellant has its principal place of business in Chicago, and it is contended by its counsel that it conducted its business wholly in that city, largely by correspondence; that any male white person between the ages of nineteen and fifty-five years, engaged in certain occupations not of a hazardous nature, might make application for membership in said association; that such application was mailed to the office of the association located in Chicago; that the directors

of the association passed upon the statements contained in the application at the office in Chicago, and if the application was accepted a certificate of membership was issued to the applicant, being mailed to him from the office in Chicago or delivered to him personally at said office; that appellant had never engaged any agent or other person to give his time to representing it in seeking business in the State of Nebraska, or, for that matter, in any other State; that it never paid any person any sum as commission, fee or emolument for or on its behalf in securing applications for membership or collecting assessments in Nebraska; that it has never solicited insurance in Nebraska except through its own members; that it has not made any contracts in Nebraska, collected premiums or adjusted, settled and paid losses in Nebraska, or in any place except at the office of the association in Chicago; that it never had or maintained any office or agent for the transaction of business in Nebraska, or in any other place except Chicago; that its method of doing business is to receive applications from various States in the Union by mail; that its plan for securing these applications is, that when appellant forwards notices from Chicago to its members as to the payment of dues it encloses blank applications, with a request to the members to solicit others to make application and forward the sum of two dollars as a membership fee; that when these applications are so made through its members in various sections of the country, such applications, with the membership fee enclosed, are forwarded by mail and received in Chicago, and thereafter all notices of dues, with like requests for members to secure applicants, are forwarded by mail to the member at his home, and the dues are paid by the member sending the money through the mails to the Chicago office; that whenever an accident happens or a member dies and a claim is made against the association, if any question is raised by the association as to its liability an investigator or adjuster is sent to the place

where the accident or death occurred; that he makes his report to the board of directors at Chicago, and if a proposition of settlement is made by the claimant such proposition is reported to the board for action; that all transactions between the member and the association are conducted by mail, except in the case of an adjustment, which is carried on as just stated. It further appears that the application of deceased, George G. Pembleton, of Nebraska, was received in the same manner all other applications for membership were usually received; that he was recommended for membership by Phil S. Easterday, a member of the association, and was accepted by the board of directors at Chicago on September 15, 1906, upon which date the policy was issued at Chicago and deposited in the mails at Chicago, addressed to Pembleton at his home address. It appears from the record that Weller, upon whom service of process was made as to the litigation in Nebraska, was a member of the association; that he has never been an officer, employee or regularly constituted agent of such association and never received or became entitled to any compensation for what he did; that some time before this litigation was instituted Weller transmitted to the association the applications of two persons, viz., a Mr. Williams and a Mr. Reinhardt, along with the membership fee in each case; that these applications were accepted and acted upon by the association and the certificates of membership forwarded to Williams and Reinhardt, respectively; that before sending in these two applications Weller had received the application blanks urging the members to make use of the same to induce others to join the association; that Weller was a resident of Omaha, Nebraska, was president of two Nebraska assessment companies, with which he was actively engaged, and was also vice-president of a wholesale drug company in Omaha; that he maintained an office with the drug company, and had at the same place an office for the two Nebraska assessment companies but

was never a paid solicitor for any insurance company; that the two applications sent to appellant were made through him in April and July of 1916, respectively, and that the membership fee of two dollars in each case was remitted by him in the form of checks of the Richardson Drug Company, drawn by Weller as vice-president of that company.

It appears to be suggested that the provision of the Federal constitution requiring that full faith and credit shall be given in each State to the judicial proceedings of every other State, and the act of Congress passed in pursuance thereof, prevent an inquiry into the jurisdiction of the court by which the judgment offered in evidence was rendered. It has been held by the Federal courts that the record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction, and if it be shown that such facts did not exist the record will be a nullity, notwithstanding it may recite that they did exist; that want of jurisdiction may be shown either as to the subject matter or the person. (*Thompson v. Whitman*, 18 Wall. 457; *Simmons v. Saul*, 138 U. S. 439; *National Exchange Bank v. Wiley*, 195 id. 257.) This court has laid down a similar rule that the courts of this State may inquire into the proceedings, judgments or decrees of a sister State to determine whether the court had jurisdiction of the subject matter or the parties. (*Field v. Field*, 215 Ill. 496; *Forsyth v. Barnes*, 228 id. 326.) It has also been settled by the Federal decisions that three conditions are necessary to give a court jurisdiction *in personam* over a foreign corporation: First, it must appear that the corporation was carrying on its business in the State where process was served on its agent; second, that the business was transacted or managed by some agent or officer appointed by or representing the corporation in such State; third, the existence of some local law making such corporation amenable to suit there as a condition, express or implied, of doing business in the State. (21 R. C. L. 1340;

Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602; *Armstrong Co. v. New York Central and Hudson River Railroad Co.* (Minn.) Ann. Cas. 1916E, 335.) It is also established that in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof. *St. Clair v. Cox*, 106 U. S. 250; *Commercial Mutual Accident Co. v. Davis*, 213 id. 245, and cases there cited.

The courts have laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to make it subject to jurisdiction. In general it may be said that the business must be of such a character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process. (21 R. C. L. 1341; *Green v. Chicago, Burlington and Quincy Railway Co.* 205 U. S. 530; *St. Louis and Southwestern Railway Co. v. Alexander*, 227 id. 218.) The transaction of business must be such that the corporation is for the time being within the State in which it is sued. (*Armstrong Co. v. New York Central and Hudson River Railroad Co. supra.*) The general rule is, that the mere solicitation of business by agents of a foreign corporation is not such "doing business" within the State as to subject the foreign corporation to the jurisdiction of the courts of the State in which the business is solicited. The tendency of the courts, however, in recent years, seems to be toward considering agents engaged in soliciting business as the representatives of the corporation for the purpose of the service of process. (21 R. C. L. 1342.) The rule has been laid down by the United States Supreme Court that where there is a continuous course of business in the State by the solicitation of orders which are

sent to another State, in response to which the subject matter thereof is delivered in the State where the order was taken and payment is received therein by money, notes or checks, this constitutes doing business in such State, rendering the corporation subject to the process of its courts. (*International Harvester Co. v. Kentucky*, 234 U. S. 579.) But so far as we are advised the Federal courts have never laid down the rule that the mere solicitation of business by agents of a foreign corporation within the State was the doing of business in that State. Many decisions hold that the taking of orders for goods in a State by an ordinary agent or salesman is not doing business therein, where orders so taken are forwarded to the corporation at its domicile for its acceptance and the goods are sent directly to the purchasers. (12 R. C. L. 76.)

Counsel for appellee rely particularly, in support of their contention that the solicitation of business as is here shown in the State of Nebraska was the doing of business in that State, on *Connecticut Mutual Life Ins. Co. v. Spratley*, *supra*, and *Commercial Mutual Accident Co. v. Davis*, *supra*. Neither of these decisions, as we read them, holds to that effect. The principal holding in the first of these cases is to the effect that a foreign insurance company which has been doing business within a State through its agents does not cease to do business therein when it withdraws its agents and ceases to obtain or ask for new risks or obtain new policies while at the same time its old policies continue in force and the premiums thereon are paid by policyholders to an agent residing in another State who was once the agent in the State where the policyholders reside. The second decision of these two holds that an insurance company with outstanding policies in the State, on which it collects premiums and adjusts policies, must be held to be doing business within the State so as to render it liable to an action and service of process, according to the laws of the State, on a doctor sent by said insurance company to in-

investigate the loss, the doctor having the power to adjust such loss.

The strongest case, perhaps, in favor of appellee's contention on this question is that of *International Harvester Co. v. Kentucky*, *supra*. In *Green v. Chicago, Burlington and Quincy Railway Co.* *supra*, the Supreme Court of the United States held that the mere solicitation of business in the State was not the doing of business in that State. (See, also, to the same effect, *People's Tobacco Co. v. American Tobacco Co.* 246 U. S. 79.) While the *Harvester Co. case*, *supra*, held that the *Green case* was an extreme case, it reaffirmed the doctrine laid down in the former decision that the mere solicitation of business was not the doing of business in the State, and continued (p. 587): "In the case now under consideration there was something more than mere solicitation. In response to the orders received there was a continuous course of shipment of machines in Kentucky. There was authority to receive payment in money, check or draft and to take notes payable at banks in Kentucky." On the facts in that case and this they are clearly distinguishable. It seems to be conceded that there was no authority here to pay for the insurance in money, check or draft or take notes payable on banks in Nebraska. The only thing that the person soliciting insurance in this case could do was to forward the money, check or draft for premium with the application to the head office in Chicago for the approval of the appellant association. This court has discussed this question in *Booz v. Texas and Pacific Railway Co.* 250 Ill. 376, and there said (p. 381): "The defendant, being a foreign corporation, could only be served in this State if it was doing business here, and no one could be an agent of the defendant unless he had power to represent it in the transaction of some part of the business contemplated by its charter. There was no one in this State who had power to make any contract or bind the defendant in any way, and the mere solicitation of business by

persons who have no other authority is not doing business within this State." The reasoning of this court in *Barnard v. Springfield and Northeastern Traction Co.* 274 Ill. 148, tends also to support the conclusion that the appellant was not doing business in Nebraska at the time this policy was taken out or when this litigation was instituted. See, also, *Berger v. Pacific Railroad Co.* 9 L. R. A. (N. S.) 1214, and authorities cited in note, and *Armstrong Co. v. New York Central and Hudson River Railroad Co.* L. R. A. 1916E, 232, and authorities cited in note.

Counsel for appellee insist that the reasoning of this court in *Firemen's Ins. Co. v. Thompson*, 155 Ill. 204, is directly in conflict with this conclusion. In that case an Illinois insurance company took a risk under a fire insurance policy in Wisconsin, and it was held that the company was doing business in Wisconsin so as to render it subject to the service of process in that State. It must be conceded that some of the reasoning in that case does tend to uphold the argument of counsel for appellee, but the facts in that case are somewhat different and on that account it might be held that the decision in that case is not necessarily controlling here. Furthermore, in that case the constitutional question as to due process of law does not seem to have been raised or passed upon by the court. Indeed, if the question had been raised it must have been held to be waived because the appeal in that case was taken from the trial court to the Appellate Court and then to this court. The decisions in this State as to due process of law under the fourteenth Federal amendment must be controlled by the decisions of the Federal courts rather than by the decisions of our own or other State courts. (*Old Wayne Mutual Life Ass'n v. McDonough*, 204 U. S. 8; *Thompson v. Whitman*, *supra*; *Forsyth v. Barnes*, *supra*.) The decisions of the United States Supreme Court heretofore cited conclusively hold that the mere solicitation of business, as shown by this record, was not such doing of busi-

ness in Nebraska as to render the company liable to service of process therein. It is our duty, under the law, to overrule, if necessary, even our own decisions and follow the rule laid down by the Federal Supreme Court in matters of this kind. *Rothschild & Co. v. Steger Piano Co.* 256 Ill. 196.

It is argued by counsel for appellee that the legislatures of this and other States have been compelled to enact statutes for the purpose of preventing insurance companies which issue policies upon property and lives from forcing the insured or beneficiaries to go to a foreign State, hundreds of miles from their homes, to enforce the contract; that it is apparent from this record that the appellant has made a studied attempt to exempt itself from liability in the courts of the States where the members live, where the applications are made and where the dues and losses are paid; that the statutes of this State forbid a foreign insurance company to transact any business in this State without first securing a license from the Auditor of Public Accounts, and that before receiving said license the company must stipulate that it will not remove any suit instituted against it into any United States court and that if it should do so then its license would be revoked; that every foreign life insurance company before doing business here must in writing appoint an attorney resident in the State, upon whom all lawful process against the company may be served with like effect as if the company had been created in the State, and that such power of attorney must stipulate that any lawful process against the company which is served on such attorney shall be of the same legal force and validity as if served on the company; that for the further purpose of protecting the insured in this State certain deposits must be made with the Auditor; that the record shows, also, that similar statutes have been enacted in the State of Nebraska. While we agree with counsel for appellee that to hold the service in Nebraska is invalid must cause a hardship to

appellee in this case, we feel constrained to rule, until the Supreme Court of the United States has ruled to the contrary, that we must follow the former decisions of that court, and hold that the mere solicitation of business such as shown by this record is not doing business in the State of Nebraska by appellant so as to justify such a service of process as is here shown upon appellant in the courts of Nebraska. The reasoning of the Federal court in *Tomlinson v. Iowa State Traveling Men's Ass'n*, 251 Fed. Rep. 171, is in point here. The court there said (p. 173): "It is true that it is less convenient, and probably more expensive, for the plaintiff to prosecute her action in Iowa, where valid service can readily be procured; nevertheless, this is one of the incidents of doing business with a foreign insurance company of the character of this defendant, which does business almost, if not quite, exclusively with commercial travelers, who live in widely separated localities. It may be doubted whether the burden imposed upon the entire membership of such an association, depending, as it does, entirely upon moderate assessments for the payment of losses, as a result of being compelled to defend, presumably, in every State of the Union, would not outweigh the physical and financial inconvenience of the individual beneficiary. However this may be, the law must be administered as it is found to apply, and the plaintiff is not left without her remedy, but may pursue it, if valid and subsisting, in the proper jurisdiction."

A statute has been enacted in Nebraska which reads: "Any person or firm in this State who shall receive or receipt for any money on account of or for any contract of insurance made by him or them, or for any such insurance company or individual aforesaid, or who shall receive or receipt for money from other persons to be transmitted to any such company or individual aforesaid for a policy or policies of insurance or any renewal thereof, although such policy or policies of insurance may not be signed by

him or them as agent or agents of such company, or who shall in anywise directly or indirectly make or cause to be made any contract or contracts of insurance for or on account of such company aforesaid, shall be deemed, to all intents and purposes, an agent or agents of such company and shall be subject and liable to all the provisions of this chapter." This statute has been held constitutional by the courts of that State. (*Taylor v. Illinois Commercial Men's Ass'n*, 84 Neb. 799; *Tomson v. Iowa State Traveling Men's Ass'n*, 88 id. 399.) The following decisions also, as argued by counsel for appellee, tend to support the constitutionality of this statute: *Iowa State Traveling Men's Ass'n v. Ruge*, 242 Fed. Rep. 762; *Cox v. Railway Conductors Co-operative Ass'n*, 194 Mich. 213; *Sadler v. Mobile Life Ins. Co.* 60 Miss. 391; see, also, 21 R. C. L. 1344, and cases there cited. In view, however, of the conclusion that we have reached on this record as to appellant not being shown to be transacting or doing business in Nebraska at the time of the service of process in this case or at the time the policy in this case was executed, it is unnecessary to discuss further the constitutionality of this Nebraska statute, for it has been repeatedly held that in order to make such a statute applicable to a foreign corporation in any State it must be shown that such corporation was doing business in that State. *Old Wayne Mutual Life Ass'n v. McDonough*, *supra*; *Fraxley v. Pennsylvania Casualty Co.* 124 Fed. Rep. 259; *Commercial Mutual Accident Co. v. Davis*, *supra*, and cases there cited.

Having held that the appellant was not transacting or doing business in Nebraska so as to authorize the service of process on its members in that State it is unnecessary to pass upon the other questions raised in the briefs.

For the reasons stated there can be no recovery, and the judgment of the circuit court will be reversed.

Judgment reversed.

(No. 12686.—Reversed and in part remanded.)

JOHN CURRAN, Appellee, *vs.* THE CHICAGO AND WESTERN INDIANA RAILROAD COMPANY *et al.* Appellants.

Opinion filed June 18, 1919—Rehearing denied October 10, 1919.

1. NEGLIGENCE—*whether there is evidence tending to support cause of action is question of law.* Whether there is any evidence in the record which fairly tends to support the cause of action is a question of law.

2. SAME—*when failure to comply with an ordinance imposes no liability.* A failure to comply with an ordinance is merely *prima facie* evidence of negligence and imposes no liability if such failure does not contribute to the injury complained of.

3. SAME—*when failure to fence tracks of railroad is not proximate cause of injury.* The failure of a railroad company to fence its tracks according to the terms of an ordinance cannot be the proximate cause of an injury to a person by a train on a parallel track belonging to another company which had also failed to fence its tracks, though such person, in order to reach the place where he was injured, had crossed the tracks of the first company.

4. SAME—*whether evidence tends to show that certain negligence was proximate cause of injury is question of law.* Whether there is any evidence fairly tending to show that the negligence charged was the proximate cause of the injury is a question of law which is raised by a motion for a directed verdict.

5. ORDINANCES—*when notice to fence railroad tracks is essential.* Under an ordinance requiring railroads to fence tracks when and where the city council shall direct, notice to a railroad company as to when and where to construct its fences is essential to its liability for failure to comply with the ordinance.

CARTER and STONE, JJ., dissenting.

APPEAL from the First Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding.

C. G. AUSTIN, JR., and BEVERLY W. HOWE, for appellant the Chicago and Western Indiana Railroad Company.

LOESCH, SCOFIELD, LOESCH & RICHARDS, for appellants the Pennsylvania Company and the Pittsburgh, Fort Wayne and Chicago Railway Company.

FRANCIS X. BUSCH, CHARLES S. DENEEN, WILLIAM W. MCCALLUM, and ELMER M. LEESMAN, for appellee.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

This was an action on the case brought by the appellee, John Curran, a minor, by his guardians and next friends, in the circuit court of Cook county to recover damages against the Chicago and Western Indiana Railroad Company, (hereafter called for convenience the Western Indiana,) the Belt Railway Company, the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, the Pennsylvania Company, and the Pittsburgh, Fort Wayne and Chicago Railway Company, (the last two hereafter called for convenience the Pennsylvania Lines.) Damages were claimed for personal injuries sustained by appellee on April 15, 1915. The declaration contained four counts. The first charged, in substance, that appellants had failed to build fences alongside their tracks, in violation of certain ordinances therein set out, and that as a consequence thereof appellee, a boy fifteen years old, walked upon the tracks where people had been in the habit of crossing, and while in the exercise of due care and while standing beside a moving train was struck by some projection from one of the cars and thrown down under the wheels. The second count charged a failure to maintain sufficient fences, in violation of the same ordinances. The third count, which charged negligence in operating a train with some object projecting from its side, and the fourth count, which charged willful and wanton injury, were both dismissed by appellee. The case went to the jury on the first and second counts under pleas of not guilty of the Western Indiana

and the Pennsylvania Lines, the suit being dismissed by appellee as to the Belt Railway Company and the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. The jury returned a verdict against appellants, fixing damages at \$30,000, upon which judgment was entered. The judgment was affirmed on appeal to the Appellate Court, and a certificate of importance having been granted by the Appellate Court, the appellants have prosecuted a further appeal to this court.

John Curran, a lad fourteen years and ten months old, lived on the day of the accident at 9721 Houston avenue, Chicago. Houston avenue runs north and south. One block east is Baltimore avenue. Running east and west and crossing Houston avenue at right angles are Ninety-sixth, Ninety-seventh and Ninety-eighth streets. To the east of Baltimore avenue about 200 feet, and running north and south parallel with the avenue, are the tracks of the Pennsylvania Lines. Immediately east of the tracks of the Pennsylvania Lines are the tracks of the Western Indiana. Ninety-sixth and Ninety-eighth streets continue east from their intersections with Houston avenue across Baltimore avenue and the tracks of appellants. Ninety-seventh street does not cross the tracks but ends at Baltimore avenue. It is paved and curbed to Baltimore avenue. Between Ninety-sixth and Ninety-eighth streets and Baltimore avenue and the tracks of appellants is an open, rectangular plot of ground grown up with weeds and tall slough grass. To the east of the tracks, between Ninety-sixth and Ninety-eighth streets, is another open tract extending to the Calumet river, also grown up with tall, coarse grass, except an acre fenced and occupied by Ira L. Wiggins, who lived on the south side of Ninety-sixth street, about a block east of the tracks and about two blocks west of the Calumet river. There was a path through the weeds on Ninety-seventh street extended, across the tracks to the Wiggins place. Wiggins raised poultry and truck, and people came

to his place by way of the path to get fowls, eggs and vegetables. Boys also crossed there by way of the path to go swimming. There was no fence whatever on either side of the Pennsylvania tracks, and, so far as the evidence shows, never had been. There was no evidence that there had ever been a fence on the west side of the Western Indiana tracks. On the east side was a line of old posts, but for years there had been no fence there. Who put the posts there does not appear. Tracks here ran through a low, open field, there being no buildings, trees or obstructions on either side of Ninety-seventh street extended, on either side of the tracks. Coarse grass on each side of the tracks was in the fall about as high as a man's head and a footpath was broken through this growth. At the time of this accident there was not much growth there. About 7:40 in the morning of April 15, 1915, appellee left his home to go to the Wiggins place on an errand for his mother. He walked north on Houston avenue to Ninety-seventh street and then turned east on Ninety-seventh street. As he approached Baltimore avenue he saw a long mixed freight train passing south. He continued east on Ninety-seventh street and crossed Baltimore avenue. He then continued east across the open tract along the path to the tracks. The train was still passing south on the third track, which was the west track of the Western Indiana. It was a train of the Belt Railway Company. Appellee walked across the two Pennsylvania tracks and then stood between the east Pennsylvania track and the west Western Indiana track, waiting for the train to pass. As he stood there, about two feet from the train, he turned, facing south, and exposed his left side to the train. Though there is some conflict in the evidence, it fairly tends to show that some object projecting from one of the cars struck appellee in the back of the head and knocked him forward. In some manner, in falling, his left arm got under the wheels and it was so crushed that it had to be amputated. Appellee immediately jumped up and ran home. Ap-

pellee had lived in this neighborhood for more than five years and was thoroughly familiar with all surroundings. He knew that Ninety-seventh street ended at Baltimore avenue. He knew there were no fences along the tracks. He knew that the Pennsylvania used the first two tracks and that the Western Indiana used the next three tracks. There were about six feet between the adjacent tracks of the two systems.

This case rests entirely upon the alleged negligence of the appellants in their failure to build and maintain fences in accordance with certain ordinances of the city of Chicago. Unless, therefore, the appellants were required to fence but neglected to do so, and such neglect to fence was the proximate cause of this injury to appellee, there can be no recovery.

Section 3 of an ordinance of the city of Chicago of March 26, 1890, provides: "Every person, firm, company or corporation owning, leasing or operating a steam railroad within the corporate limits of the city of Chicago, shall, within such time as may be prescribed by the mayor and commissioner of public works, construct or cause to be constructed on each side of its tracks, and in such place with reference thereto as the mayor and commissioner of public works shall approve or direct, except where public streets shall intersect or cross the same, substantial walls or fences of such material, design, proportion and height as shall be determined and approved by the mayor and commissioner of public works." Section 1994 of the revised municipal code of Chicago of 1905 provides: "Every person or corporation owning, leasing or operating a steam railroad within the city, shall, within such time as may be prescribed by the city council, construct or cause to be constructed on each side of its tracks, and in such place with reference thereto as the city council shall direct, except where public streets shall intersect or cross the same, substantial walls or fences of such material, design, proportion and height as shall be

determined and approved by the mayor and commissioner of public works." Section 2198 of the revised municipal code of Chicago of 1911 is identical with the last quoted section of the code of 1905.

Before there was an obligation to fence the tracks of appellants it must have been shown by competent evidence that appellants were notified by the city some time during the life of the ordinances and before April 15, 1915, when and where the fences were to be constructed along their tracks. There was offered in evidence as against the Western Indiana a letter-press copy of the following letters:

"April 18, 1890.

"Benjamin Thomas, Esq., V. P., General Manager Chicago and Western Indiana Railroad:

"DEAR SIR—In accordance with your request I enclose to you two copies, each, of general specifications as to the erection of fences, gates and so forth under ordinance lately passed, and the permit to proceed under the same, which was issued in connection therewith. These documents are to be signed according to the form prescribed in same and a copy retained by each party to the agreement.

"Yours truly,

W. H. PURDY, *Commissioner of Public Works."*

"January 8, 1891.

"Benjamin Thomas, Esq., Vice-President and General Manager Chicago and Western Indiana:

"DEAR SIR—I consulted with his honor, the mayor, yesterday, in relation to the matter of fencing your tracks along a certain portion of Wallace street as per our interview of yesterday morning. It appears that even if the width of the sidewalk on the west side of Wallace street be established at four feet there will not be sufficient space for your fence, a public driveway and a sidewalk; and still the mayor and commissioner of public works have no power to authorize the construction of a fence which will render the driveway impassable, nor have we the right to release the Chicago and Western Indiana railroad from their obligation to fence their tracks. If you cannot throw your tracks over east so as to provide for a fence without encroaching upon the driveway, I would suggest that you present a brief statement of the facts in writing, to the city council and ask for such relief as may be possible. If you prefer to make such a statement to me I will transmit it to the council.

W. H. PURDY, *Commissioner of Public Works."*

There was also offered a letter-press copy of a circular letter headed with initials of divers railroads, including initials "C. & W. I.," dated September 23, 1890, which follows:

"DEAR SIR—On July 28 the city council passed the following order: 'Ordered that the commissioner of public works require all companies or corporations operating lines of steam railroads within the boundaries of the city of Chicago to furnish a statement to what extent an ordinance recently passed by this council allowing or requiring such companies to enclose their rights of way, respectively, has been complied with; what streets such companies or corporations cross, and at which of said streets so crossed gates have been erected, and at which of said streets fences, if any, have been erected and the street crossings closed; by what right such crossings are closed and barred from public traffic. Said commissioner shall report such information to the next regular meeting of the council.' In accordance with the above order you will please communicate to this department, without delay, all information in detail which it calls for, as regards your company, and oblige,

"Yours truly,

W. H. PURDY, *Commissioner of Public Works.*"

There was also offered in evidence a certain resolution of the city council of the city of Chicago dated June 29, 1891, which follows:

"Whereas, there is now in force an ordinance known as the 'Fast Train Ordinance,' passed by the city council, requiring all the railroads running trains inside the limits of this city to erect fences, gates, etc., and maintain watchmen at various crossings:

"*Resolved*, that the commissioner of public works be requested to report to this council, at its next regular meeting, the names of all railroads that have fully complied with the provisions of said ordinance, and if there are any railroads that have not fully complied with said ordinance, that the commissioner be requested to report if such roads are running any trains faster than the rate of ten miles an hour within the limits of said city of Chicago."

The above is all the evidence received to show that the Western Indiana had been notified, under the ordinances, when and where to erect fences along its tracks. There was no proof to what point these communications were addressed nor whether they were mailed nor that they ever reached the Western Indiana. There were no communica-

tions from the Western Indiana to the city or any of its officers. Granted that the communications were received, do they fairly and reasonably tend to show that the Western Indiana was ever notified to construct fences along its tracks at the point in question? Was there ever any action taken or reports made on the orders and resolutions of the city council? It appears from the evidence that there was never a fence on the west side of these tracks at the place where appellee went upon the right of way. The city council had permitted this track to remain unfenced for twenty-five years after the adoption of the ordinance of 1890. It would appear that the city council not having required a fence to be erected at this point regarded it as unnecessary. It will be noted that no business was carried on between the tracks and the Calumet river on either side of Ninety-seventh street extended. Giving this evidence the most favorable consideration, it cannot be said that the city council or anyone else directed the Chicago and Western Indiana Railroad to build a fence at the point in question. The weight of the evidence is never considered on review where the same has been passed on by the Appellate Court, but whether there is any evidence in the record which, taken with all its reasonable inferences, fairly tends to support the cause of action is a question of law for this court and may be considered on review. (*Babbitt v. Grand Trunk Western Railway Co.* 285 Ill. 267; *Jenkins v. LaSalle County Coal Co.* 264 id. 238; *Foster v. Wadsworth-Howland Co.* 168 id. 514.) It follows, therefore, that it was error to admit in evidence these ordinances against the Chicago and Western Indiana Railroad, and it was error not to instruct the jury to find the Chicago and Western Indiana Railroad not guilty under the first and second counts of the declaration.

There was considerable correspondence between the commissioner of public works and the Pennsylvania Lines. Considering this correspondence in the most favorable light

for the appellee and resolving all the intendments reasonably to be drawn therefrom in favor of the appellee, it may be said that the Pennsylvania Lines were brought within the ordinance. It then remains to be decided whether or not the neglect on the part of the Pennsylvania Lines to fence their tracks was the proximate cause of this injury.

A failure to comply with an ordinance is merely *prima facie* evidence of negligence. If the failure to comply with the ordinance does not cause or contribute to cause the injury complained of, such failure does not impose a liability. (*Gibson v. Leonard*, 143 Ill. 182.) After reviewing the authorities at great length we said in *Seith v. Commonwealth Electric Co.* 241 Ill. 252: "If the negligence does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent independent act of a third person, the two are not concurrent and the existence of the condition is not the proximate cause of the injury." In the *Seith case*, *supra*, we further said, quoting Judge Cooley: "If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause and refuse to trace it to that which was more remote." And further quoting Wharton on Negligence: "Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent, responsible human action." This case is quoted with approval in *Jenkins v. LaSalle County Coal Co.* *supra*.

✓ If the absence of a fence along the tracks of a railroad can be the proximate cause of an injury, it can only be the

absence of a fence along the tracks of the road on which the injury occurred and not the absence of a fence along parallel tracks belonging to other roads. The duty to fence, imposed by law upon a parallel railroad, cannot be made to depend upon the observance or non-observance of the legal duty resting on the Pennsylvania Lines. (*Illinois Central Railroad Co. v. Davidson*, 225 Ill. 618; *Kelver v. New York, Chicago and St. Louis Railroad Co.* 126 N. Y. 365; *Frisch v. Chicago Great Western Railway Co.* 95 Minn. 398.) Under this ordinance each railroad to which it is made to apply is required to fence its own tracks. The duties of the Pennsylvania Lines were in relation to the dangers upon its own right of way. The duty to exclude persons from the right of way of an adjoining railroad with parallel tracks was certainly not upon the Pennsylvania Lines. Whether there is any evidence fairly tending to show the negligence charged was the proximate cause of the injury is a question of law which is raised by the motion for a directed verdict. (*Jenkins v. LaSalle County Coal Co. supra*; *Seymour v. Union Stock Yards Co.* 224 Ill. 579.) Conceding that the negligent act of the Pennsylvania Lines in not erecting a fence at the point in question created a condition which made the injury possible, the injury could not have occurred but for the independent act of the Belt Line train. That act was an independent cause of the injury by one for whose act the Pennsylvania Lines was not responsible and by one over whom it had no control. It follows that the Pennsylvania Company and the Pittsburgh, Fort Wayne and Chicago Railway Company were not liable for such act, and the negligence alleged against them in the first and second counts of the declaration was not the proximate cause of the injury. The circuit court ought therefore to have given the instruction directing a verdict of not guilty as to the Pennsylvania Company and the Pittsburgh, Fort Wayne and Chicago Railway Company. ✓

Many other questions are raised by this record, but as it is not necessary to pass upon them in the decision of this case it would unnecessarily lengthen this opinion to discuss them.

For the errors hereinbefore pointed out, the judgment is reversed as to the Pennsylvania Company and the Pittsburgh, Fort Wayne and Chicago Railway Company, and the judgment is reversed and the cause remanded as to the Chicago and Western Indiana Railway Company.

Reversed and in part remanded.

CARTER and STONE, JJ., dissenting.

(No. 12518.—Appeal dismissed.)

THE CITY OF NORTH CHICAGO *et al.* Appellees, *vs.*
THOMAS McHUGH, Appellant.

Opinion filed June 18, 1919—Rehearing denied October 9, 1919.

APPEALS AND ERRORS—*no appeal lies from order of county court approving certificate of completion of local improvement.* Under section 84 of the Local Improvement act the order of the county court approving the certificate of cost and completion of a local improvement is conclusive as to all the facts which the county court is required to find, and no appeal or writ of error is allowed to review the finding.

APPEAL from the County Court of Lake county; the Hon. PERRY L. PERSONS, Judge, presiding.

COOKE, POPE & POPE, and ELA, GROVER & MARCH, for appellant.

MAX PRZYBORSKI, ELAM L. CLARKE, and MARTIN C. DECKER, for appellees.

Mr. JUSTICE STONE delivered the opinion of the court:

This cause comes to this court on appeal from an order of the county court of Lake county approving the final certificate of the board of local improvements of the city of

North Chicago of the cost and completion of a certain sewer constructed under the Local Improvement act. Appellant on the 6th day of February, 1918, obtained leave of court to file, and did file, an intervening petition as surviving partner of the contractors who constructed the sewer, alleging that the certificate of cost and completion filed by the board of local improvements is defective, in that it does not correctly set forth the cost of the work; that the cost of such work as recited in the certificate is based upon an erroneous computation of the amount of labor done and material used in the making of the improvement, in that it omits a large amount of labor done and material actually furnished by the contractors; that the cost of the work as recited in the certificate is much smaller in amount than the actual cost of the improvement when computed according to the ordinance and the contract for the improvement. The intervening petition prayed for a hearing upon the petition and that the final certificate of cost and completion by the board of local improvements be modified and changed so as to correctly recite the actual cost of the improvement according to the contract and the ordinance therefor. The city of North Chicago on the same day filed its answer denying the allegations of the intervening petition, and a hearing was had thereon. A rule was entered upon appellant to file a bill of particulars. In compliance with such rule a bill of particulars was filed, setting forth under ten separate and distinct headings the facts which made it necessary to expend, as extras, large amounts of labor and money in constructing the improvement, over and above the amount called for in the contract; that such extra expenditure was made necessary because of the inaccuracy of the survey data of the engineer, submitted at the time of the bidding and upon which the bid was made and the contract consummated. All of the items in the bill of particulars set forth are in one form or another claims for extra or additional labor and material not included in the original

contract, which appellant contended were necessary. On the hearing of the whole matter testimony was introduced on the certificate of cost and completion filed by the appellees, and likewise on the intervening petition and bill of particulars of appellant. The county court found that the matters in the certificate stated and set forth were true; that the improvement has been completed and accepted by the board of local improvements and that it conforms substantially to the requirements of the original ordinance for the construction of the improvement, and ordered that the certificate of cost and completion be approved as filed.

Appellees contend that under section 84 of the Local Improvement act the order of the county court is final and that no appeal therefrom or writ of error thereto will lie. It is contended on the part of the appellant that an appeal will lie from the order of the county court entered herein notwithstanding the provisions of section 84, for the reason that such provisions against appeals or writs of error do not apply in a case like the one at bar, where the trial court did not perform its statutory duties respecting the statutory hearing provided for. In support of this contention the appellant cites *Mercy Hospital v. City of Chicago*, 187 Ill. 400. That case arose under the Local Improvement act of 1897, section 47 of which provided that the county court shall in special assessment cases review the commissioner's apportionment of cost between the public and private property where objections have been made; also providing that the order of said court in that matter shall be conclusive and not subject to review. In that case appellant filed certain objections, in support of one of which counsel moved the court to inquire whether or not the assessment as made and returned was an equitable distribution of the cost between the public and the property benefited. The court refused to hear evidence upon that subject or to inquire in any manner into the question so raised, on the ground that it was without authority to do so. It was there

held that while the order of the county court was final on the question of the correctness of the distribution of cost, such order was not final on the question of jurisdiction or power of that court to make a certain inquiry raised by an objection. Such are not the facts here, as is shown by appellant's brief. Appellant asked leave to file an intervening petition. This leave was granted. The substance of the intervening petition was that the facts set out in the certificate of cost and completion filed were not true as to the matter of cost; that there were certain additional costs which should be considered. The intervening petition thus raised a question of fact. The court heard the evidence in support of the petition. It follows that the finding of the court was a finding on the facts.

Section 84 of the Local Improvement act provides that on the filing of the certificate of cost and completion the court shall, upon proper notice being given, proceed to hear and determine in a summary manner the facts alleged in the certificate, and, if any objections are filed thereto, shall hear the same and enter an order according to the fact. Said section further provides: "Such order of the court shall be conclusive upon all the parties and no appeal therefrom, or writ of error thereto, shall be allowed to review or reverse the same."

It is, however, insisted by appellant that in view of the fact that there was no denial of the truth of his testimony concerning extra expenditures, therefore the order of the court amounted to a denial of a hearing upon his intervening petition. We are unable to see the force of this contention. An examination of the record discloses that there was no contradictory evidence concerning such expenditures on the part of appellant. It is contended by appellees that there was no legal authority given to the appellant to make such expenditures; that orders for the same were not in writing. To this appellant replies that any re-

quirement that the orders be in writing was waived by appellees. It requires but the mere statement of that portion of the record to disclose that it involves questions of fact. It is not contended that the county court refused to hear testimony or refused to allow the petition to be filed. In fact, it was filed and testimony was heard thereon. We are of the opinion, therefore, that appellant's contention that the order of approval amounted to a refusal to hear his petition is without foundation. The rule is well settled in this State that under section 84 of the Local Improvement act the order of the county court is conclusive as to all the facts which the county court is required to find on the hearing on the certificate of cost and completion of the improvement. This includes the finding as to the cost as well as the finding whether the work substantially complied with the ordinance. (*Village of Niles Center v. Schmitz*, 261 Ill. 467; *City of Peoria v. Smith*, 232 id. 561.) As was said in *Village of Niles Center v. Schmitz*, *supra*: "The statute makes no distinction among the facts which the court is required to find, making the order final as to some facts and not final as to others. The order is conclusive as to all the facts which the court is required to find on such a hearing and cannot be reviewed by appeal or writ of error."

It has been suggested that to hold the judgment of the county court conclusive in this case would bar the right of appellant to relief under section 73 of the Local Improvement act. Nothing in this opinion is to be so construed.

This appeal was improvidently allowed, and it is therefore dismissed.

Appeal dismissed.

(No. 12715.—Reversed and remanded.)

JAMES BOWMAN, Defendant in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.*—(RAY E. MCCORMICK, Admr., Plaintiff in Error.)

Opinion filed June 18, 1919—Rehearing denied October 10, 1919.

1. WORKMEN'S COMPENSATION—*when failure to give notice of injury does not bar compensation.* The failure on the part of any person entitled to compensation to give notice of the injury within thirty days does not relieve the employer of his liability when the facts are known to him or to his agent, and under such circumstances the employee's failure to give such notice does not bar the claim of a personal representative, where the employee subsequently dies as a result of the injury.

2. SAME—*when requirement of section 24 of Compensation act as to filing written claim within six months does not apply.* The requirement of section 24 of the Workmen's Compensation act that a written claim for compensation be made within six months after payments have ceased, applies only where there is a continuation of the disability for which compensation has been agreed upon or awarded, and does not apply where the employee, after a partial recovery from an injury, returns to the same employment and subsequently dies as a result of his injury.

3. SAME—*effect of paragraph (d) of section 8 of Compensation act as to notice of claim where employee dies after returning to work.* Under paragraph (d) of section 8 of the Workmen's Compensation act, if an injured employee who has returned to the same employment partially incapacitated dies within eighteen months thereafter without filing a notice of claim for compensation, his widow or personal representative may file such claim within eighteen months after the employee returned to work. (*Bushnell v. Industrial Board*, 276 Ill. 262, distinguished.)

4. STATUTES—*what considered in seeking legislative intention.* In seeking the legislative intention in a statute the court may regard the existing circumstances, contemporaneous conditions, the object sought to be attained by the statute, the necessity or want of necessity for its adoption and the language used.

5. SAME—*in construing statute, court need not be confined to literal meaning of words used.* In construing a statute the court will not be confined to its literal meaning, but when the intention has been ascertained the words may be modified so as to obviate all inconsistencies therewith.

6. SAME—*ambiguous language will be construed to prevent injustice.* Where the intention in a statute is doubtful, arguments on the ground of absurdity and injustice will be considered and ambiguous language will be construed so as to reach a reasonable result and prevent hardship or injustice.

WRIT OF ERROR to the Circuit Court of Macon county; the Hon. WILLIAM K. WHITFIELD, Judge, presiding.

WHITLEY & FITZGERALD, and JOHN A. WALGREN, for plaintiff in error.

McMILLEN & McMILLEN, for defendant in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was a proceeding brought under the Workmen's Compensation act against defendant in error. The arbitrator found in favor of the claimant. On the petition for review before the Industrial Commission the award of the arbitrator was confirmed. On a writ of *certiorari* the proceeding was taken to the circuit court of Macon county for review and the orders and findings of the Industrial Commission were quashed and set aside. The trial judge thereupon certified that the cause was one proper to be heard by this court and the proceedings have been brought here for further review by writ of error.

Charles W. Musgrove, an employee of James Bowman, doing business as Bowman Bros. in Decatur, Illinois, while working as a night-man in charge of the office, barn and garage used in the taxicab, moving and storage business, was injured on the night of May 24, 1916, by an accident arising out of and in the course of his employment, by being kicked by a horse in the barn. The evidence tends to show that by the kick his head was thrown against a brick wall, and as a result of the kick and hitting the wall a large number of his teeth were knocked out and his face badly bruised and gashed and he received internal injuries,

which, according to the finding of the arbitrator and Industrial Commission, resulted in his death on August 6, 1917. He left a widow and two minor children, and the widow subsequently died. Immediately after his injury Musgrove was treated by a physician and thereafter his teeth were fixed by a dentist. The bills for these medical and dental treatments were paid in the usual course of the compensation program of the insurance company carrying the risk of the defendant in error, the doctor's bill being paid June 8, 1916, and the dentist's on December 2, 1916. Musgrove was absent from his work immediately after the injury less than a week, when he returned to his usual employment with defendant in error, the latter being short of help and needing him badly. His wounds seemed to have gradually healed and he continued his work until some time in July, 1917, when the evidence tends to show that the accumulated effects of his injuries forced him to quit. He suffered a paralytic stroke on August 2, 1917, and died four days later, on August 6, 1917. He thus remained in his former employment until about a month before he died, and up to the time of his death the evidence tends to show he continued to hope that he might soon be able to return to work. During the same month in which he died his widow spoke to defendant in error about a claim for compensation, asking if he had his men insured. Defendant in error knew of his death and attended the funeral. September 14, 1917, the widow, as administratrix of his estate, filed with the Industrial Commission on her behalf and that of her minor children, aged seven and nine years, respectively, the prescribed form of application for adjustment of claim under the Workmen's Compensation act. No question is raised that the employer and employee were not within the provisions of the act at the time of the injury. Pending the hearing before the Industrial Commission the widow died, and Ray E. McCormick was substituted as administrator *de bonis non* of the estate of Charles W. Musgrove.

The decree of the circuit court found, among other things, that the Industrial Commission was without jurisdiction, for the reason that no claim for compensation was made within the limit of time provided for by section 24 of said act; that paragraph (d) of section 8 and paragraph (h) of section 19 of the Workmen's Compensation act were not applicable to the facts in this cause. Counsel for plaintiff in error argue that both paragraph (d) of section 8 and paragraph (h) of section 19 are applicable, and that the court was therefore wrong in quashing the orders and findings of the Industrial Commission.

Counsel for defendant in error earnestly argue that the circuit court was right in ruling that the claim was not made within the limit of time provided for in section 24 of the act, under the reasoning of this court in *Bushnell v. Industrial Board*, 276 Ill. 262, as no written claim was filed by anyone "within six months after the accident." Section 24 also provides: "That the failure on the part of any person entitled to such compensation to give such notice shall not relieve the employer from his liability for such compensation, when the facts and circumstances of such accident are known to such employer, his agent or vice-principal in the enterprise." The evidence in this record tends to show, without contradiction, that the defendant in error knew all about this accident immediately thereafter, and that within thirty days from the time of the accident he had authorized the payment by the insurance company of the doctor's bill for caring for the injury. There can be no question, therefore, under the decisions of this court, that the failure to give written notice within thirty days after the accident would not prevent the recovery in this proceeding. *Suburban Ice Co. v. Industrial Board*, 274 Ill. 630; *Parker-Washington Co. v. Industrial Board*, 274 id. 498; *Conway Co. v. Industrial Board*, 282 id. 313.

Paragraph (d) of section 8 of the Workmen's Compensation act in force at the time of this accident (Laws of

1913, p. 342,) reads as follows: "If, after the injury has been sustained, the employee as a result thereof becomes partially, though permanently incapacitated from pursuing his usual and customary line of employment, he shall, except in the cases covered by the specific schedule set forth in paragraph (e) of this section, receive compensation, subject to the limitations as to time and maximum amounts fixed in paragraphs (b) and (h) of this section, equal to one-half of the difference between the average amount which he earned before the accident, and the average amount which he is earning or is able to earn in some suitable employment or business after the accident. In the event the employee returns to the employment of the employer in whose service he was injured, the employee shall not be barred from asserting a claim for compensation under this act: *Provided*, notice of such claim is filed with the Industrial Board within eighteen months after he returns to such employment, and the said board shall immediately send to the employer, by registered mail, a copy of such notice."

It is argued by counsel for plaintiff in error that the trial court improperly held that paragraph (d) of section 8 does not apply because there is no provision made that the beneficiaries of the employee may after his death file a claim for compensation within eighteen months; that a plain reading of this paragraph clearly shows that it was intended that only the employee himself could file such claim. The argument of counsel for defendant in error in their brief is not quite to that effect, their position being that paragraph (d) was intended by the legislature only to be applicable to cases arising under said paragraph and not to cases arising under the other sections of the act; that a reading of section 7 of the Workmen's Compensation act of 1913, together with section 8 and the rest of the act, shows that the legislature intended by section 7 to provide compensation for death cases and by section 8 only intended

to provide for compensation to an employee for an injury not resulting in death; that the natural and appropriate office of the proviso of paragraph (d) was to restrain and qualify the matter immediately preceding it and not to qualify the entire act; that to construe the act otherwise would be to limit the enacting clause itself, which is contrary to the general rule of construction. (*In re Day*, 181 Ill. 73; *Huddleston v. Francis*, 124 id. 195.) That this is the general rule there can be no question. With provisos, as with all other statements in the statute, the intention of the law-maker is the law. "The intention of the law-maker, if plainly expressed, must have the force of law though it may be in the form of a proviso, The intention expressed is paramount to form." (Lewis' Sutherland on Stat. Const.—2d ed.—sec. 352.) The object of construing a statute is to ascertain and give effect to the intention of the legislature. It is to be gathered from the necessity or reason for the enactment and the meaning of the words, enlarged or restricted according to their real intent. In seeking this intention the court will always have regard to existing circumstances, contemporaneous conditions, the object sought to be attained by the statute and the necessity or want of necessity for its adoption. It must also have in mind the language used by the legislature, the evil to be remedied and the object sought to be attained. In construing a statute the court will not be confined to its literal meaning. A thing within the intention is regarded within the statute although not within the letter. A thing within the letter is not within the statute if it is not within the intention. When the intention has thus been ascertained from the reading of the statute, words may be modified or altered so as to obviate all inconsistencies with such intention. *People v. Highway Comrs.* 270 Ill. 141; *Hoyne v. Danisch*, 264 id. 467; *Warner v. King*, 267 id. 82.

It is clear from reading section 24 with the other sections of the act that the legislature intended to provide such

notice of the injury as to prevent employers being liable for fraudulent claims without opportunity of investigating them before such lapse of time that the fraud could not be discovered, but that any inaccuracy or technical defect in the form of the notice would not be a bar; that the failure on the part of any person entitled to such compensation to give notice would not relieve the employer of his liability when the facts and circumstances were known to him or his agent or the one in charge and acting for him in such enterprise; that the requirement of section 24 that a written claim for compensation be made within six months after payments have ceased applies only where there is a continuation of the disability for which compensation has been agreed upon or awarded. *Casparis Stone Co. v. Industrial Board*, 278 Ill. 77.

There can be no question that the clear intent of the legislature was to provide compensation alike for death cases and for mere injury cases; that it did not intend that while there might be recovery on behalf of the employee if he lived, there could not be a recovery in favor of his widow and children if the injury caused his death. There can be no question that under paragraph (d) if Musgrove had lived he could have recovered if he had filed a claim at the time the claim was filed by his wife after his death. While the wording in paragraph (d) of the statute is not entirely clear on the question here under consideration, taking all the sections of this act together, including the purpose for which the act was enacted, it would seem most unreasonable to conclude that the legislature intended that if the injured person was able to return to work, and did so return, he would not be deprived of recovery for his injury if he did not give a written notice within six months after the accident but could give it any time within eighteen months after he returned to work, but that if he died within such eighteen months, his wife, children or other dependents could not give notice because there was no specific

provision made for them so to do, and that therefore there could not be any recovery in their behalf. It would appear from other paragraphs of section 8 that the legislature thought compensation should be paid after the death of the injured person even though the claim was originally filed in his behalf, and as the Workmen's Compensation act now reads, as amended by the act of 1917, it is obvious that it was intended that if the proceedings were instituted by the injured person and he died pending such proceedings, they could be thereafter carried on by his personal representative or beneficiary. (Laws of 1917, sec. 19, par. j, p. 504.) The Workmen's Compensation act in force at the time this injury occurred did not contain paragraph (j) but did contain it at the time these proceedings were had in the lower court. The provisions of said paragraph changed the manner of procedure and practice, and do not, in our judgment, in any way affect the vested rights of any of the parties, therefore that paragraph may be held to be in force at the time of this hearing. *People v. Clark*, 283 Ill. 221, and cases there cited.

The intention of the law, in our judgment, on this question must be gained by reading the entire act and all its provisions. Where the intention is doubtful, arguments on the ground of absurdity and injustice will be considered and ambiguous language will be construed so as to reach a reasonable result and prevent hardship or injustice. (*Wendzinski v. Madison Coal Corp.* 282 Ill. 32.) The act is to be so interpreted as effectively to remedy the ills intended to be remedied. (*City of Milwaukee v. Miller*, 154 Wis. 652.) The law is intended for the protection of workmen and their families. It is intended to afford machinery by which the burdens of injuries sustained by those who do the actual work of a business and are not themselves employers, with a duty of insurance under the act, may be socially distributed and borne by society in general. (*In re Rheinwald*, 153 N. Y. Supp. 598.) It is manifest that the

act intended that the dependents of injured persons should be provided for, and the legislature certainly never intended that such dependents could not be provided for simply because it did not specifically designate the time allowed to them to give notice of the claim of the injury. Giving to paragraph (d) a reasonable construction in the light of the other provisions of the act, we think that the legislature intended that if the injured employee should return to work and should thereafter die, his beneficiaries could not be prevented from asserting a claim for compensation if they filed a claim within eighteen months after the injured person returned to such employment. This construction is surely in accord with the spirit and purpose of the entire act.

Counsel for defendant in error argue that the reasoning of this court in *Bushnell v. Industrial Board*, *supra*, is in conflict with this conclusion. The particular question just discussed in this case as to the construction of the Workmen's Compensation act was not considered or in any way referred to in that case. Moreover, the facts in that case were entirely different from those here under consideration. We do not think, therefore, that the decision in that case has any bearing on the construction of this statute on the point here involved. The employer here knew of the accident at the time it occurred, and waived, by his action in paying the claims of the doctor and dentist, a written notice within thirty days. It is clear, also, that he knew of the condition of his employee up to the time of his death and knew of his death. He was therefore in no way injured by lack of notice before the time that the widow of Musgrove filed her claim with the Industrial Commission. We think, therefore, that the provision of paragraph (d) covers this case and that the claim was filed within the time provided thereunder, and that the circuit court was wrong in quashing the orders and findings of the Industrial Commission making an award for claims.

The holding that paragraph (d) of section 8 applies to the facts in this case renders it unnecessary to consider or pass upon the question argued by counsel for plaintiff in error that paragraph (h) of section 19 also applies to the facts in this record.

The decree of the circuit court will be reversed and the cause remanded for further proceedings in harmony with the views herein set forth.

Reversed and remanded.

(No. 12671.—Reversed and remanded.)

HARRY B. MORROW *et al.* Plaintiffs in Error, *vs.* SARAH A. MORROW *et al.* Defendants in Error.

Opinion filed June 18, 1919—Rehearing denied October 10, 1919.

1. DESCENT—*rights of inheritance of illegitimates depend solely on section 2 of Statute of Descent.* Under the common law illegitimates had no inheritable blood, and their rights of inheritance and the rights of their descendants through them are in Illinois determined solely by section 2 of the Statute of Descent.

2. SAME—*section 2 of Statute of Descent gives illegitimates inheritable blood at birth and not after mother's death.* The words "if living," in section 2 of the Statute of Descent, do not imply that the mother must be dead before an illegitimate child has inheritable blood, but the statute removes entirely the bar against illegitimates inheriting through the maternal line and gives the child inheritable blood through the mother when the child is born.

3. SAME—*mother and her legitimate children cannot inherit to the exclusion of her illegitimate children.* Where a legitimate child dies leaving no husband or child or descendant of any deceased child, the mother and the full brothers of the deceased cannot inherit its property to the exclusion of an illegitimate son and the children of an illegitimate daughter of the deceased's mother.

WRIT OF ERROR to the Circuit Court of Ford county;
the Hon. T. M. HARRIS, Judge, presiding.

PHILLIPS & MIDDLETON, for plaintiff in error Harry B. Morrow.

A. L. PHILLIPS, guardian *ad litem*, for infant plaintiffs in error.

CLOUD & THOMPSON, for defendants in error Russell A. Campbell and William E. Morrow.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

This writ of error is sued out to reverse a decree of the circuit court of Ford county sustaining a demurrer interposed by Russell A. Campbell, one of the defendants in error, and dismissing the bill for partition filed by Harry B. Morrow, one of the plaintiffs in error, for want of equity. The bill alleges, among other things, that Ollie B. Campbell died seized in fee simple of an undivided three-fourths interest in certain real estate, described as lots 1 and 2 and the east half of lot 3, in block "D," in Pell's addition to the city of Paxton, Ford county, Illinois, the other undivided one-fourth interest being in Russell A. Campbell, one of the defendants in error; that Ollie B. Campbell departed this life intestate on October 28, 1917, leaving no husband her surviving but leaving her surviving the following named persons: Sarah A. Morrow, her mother; Eugene L. Morrow and William E. Morrow, her brothers; Harry B. Morrow, her half-brother, being a child of Sarah A. Morrow born out of lawful wedlock; Clarence Olson and Glenn Olson, her nephews, and Merle L. Singleton, a niece, the last three named being children of her half-sister, Gertie Olson, deceased, said Gertie Olson being also a daughter of Sarah A. Morrow born out of lawful wedlock. The bill further alleges that Ollie B. Campbell's estate is in course of administration in the county court of Ford county and that S. Ludlow is administrator of said estate. The bill then sets forth the respective interests of each of the parties, as follows: Russell A. Campbell and Sarah A. Morrow each

a one-fourth interest; Eugene L. Morrow, William E. Morrow and Harry B. Morrow each a one-eighth interest; Clarence Olson, Glenn Olson and Merle L. Singleton each a one twenty-fourth interest, and prays partition. Eugene L. Morrow appeared by his solicitor and answered the bill, to which answer Harry B. Morrow filed exceptions. Thereafter Eugene L. Morrow filed a cross-bill. But there is nothing in these pleadings that affects the issues raised by this writ of error and so there is no necessity of further considering them here. Russell A. Campbell filed a general demurrer to the original bill filed by Harry B. Morrow. The chancellor sustained the demurrer of Russell A. Campbell and dismissed the bill for want of equity and also dismissed the cross-bill. The assignment of errors questions the action of the chancellor in sustaining the demurrer of Russell A. Campbell to the original bill and dismissing the original bill for want of equity.

The sole question raised by the demurrer was that the interests of the parties were not properly set out in the bill, because Harry B. Morrow, the complainant, and Gertie Olson, the mother of the infant defendants, were illegitimates and could not inherit from their half-sister while the mother was living. Ollie B. Campbell, Eugene L. Morrow and William E. Morrow were the legitimate children of Sarah A. Morrow now living. Harry B. Morrow and Gertie Olson were the illegitimate children of Sarah A. Morrow. Gertie Olson died prior to the death of Ollie B. Campbell, leaving her surviving her minor children, Clarence Olson, Glenn Olson and Merle L. Singleton, who are now living. The question now resolves itself into whether Harry B. Morrow, Clarence Olson, Glenn Olson and Merle L. Singleton did inherit from Ollie B. Campbell.

The identical question presented by this record has not, so far as we are aware, been before this court for decision. Cases have arisen where the statute in question has been construed, but the facts in those cases were not identical

with the instant case. Briefly stated, Ollie B. Campbell died leaving no surviving husband nor child nor descendant of any deceased child, but she left surviving her, her mother, Sarah A. Morrow, and her brothers, Eugene L. Morrow and William E. Morrow. She also left surviving her a half-brother, Harry B. Morrow, (who was the illegitimate son of Sarah A. Morrow,) and Clarence Olson, Glenn Olson and Merle L. Singleton, children of a half-sister, Gertie Olson, deceased, said Gertie Olson being also an illegitimate daughter of Sarah A. Morrow.

Whatever rights, if any, plaintiffs in error have in the real estate of Ollie B. Campbell must be by virtue of section 2 of the Statute of Descent. (*Hudnall v. Ham*, 183 Ill. 486.) That section provides: "An illegitimate child shall be heir of its mother and any maternal ancestor, and of any person from whom its mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person, and take, by descent, any estate which the parent would have taken, if living." (Hurd's Stat. 1917, p. 1073.)

Under the common law, which we adopted by statute, an illegitimate had no inheritable blood; he was kin to no one; he was *filius nullius*. This common law rule with reference to illegitimates remained the law of this State until 1845, when the legislature abrogated the common law rule and provided that an illegitimate might inherit from its mother. Various other acts were enacted by subsequent legislatures extending the rights of illegitimates, until 1872, when the present Statute of Descent was passed. While, as counsel for the defendants in error contend, the statute conferring rights upon illegitimates is in derogation of the common law, still the tendency of the legislation in this State upon this subject shows an intention upon the part of the legislature to remove the rigors of the common law and to establish a rule of descent with reference to illegitimates consonant with the finer sense of justice and right

and not to visit the sins of the parents upon the unoffending offspring. In *Bales v. Elder*, 118 Ill. 436, we reviewed the various acts with reference to illegitimates, and in discussing that statute we said: "It makes him an heir, and as such he is vested with all the rights, powers and privileges of a legitimate person who may be an heir standing in the same degree of relationship. An heir is one who, after his ancestor's death, has a right to inherit the intestate estate. An illegitimate, therefore, as heir of his mother, would be entitled to inherit from her, in case of her death, in the same manner as her legitimate children. As heir of any maternal ancestor, and of any person from whom its mother might have inherited if living, a like position is occupied. The statute, as we understand it, confers upon illegitimates and their lawful issue, as respects the mother and any maternal ancestor, and any person from whom the mother might have inherited if living, inheritable blood, and as such they have the right of inheritance as fully as legitimate children. There is nothing in the statute that will allow an illegitimate to inherit from the father of such person, but the object of the framers of the statute seems to have been to remove the common law disability of inheritance through the maternal line and in that regard place such persons upon the same footing as legitimate persons. We see no other construction that can be placed on the act without disregarding the plain and emphatic language used in the statute, which the rules of construction will not allow."

It is urged by counsel for defendants in error that the cases of *Bales v. Elder*, *supra*, and *Elder v. Bales*, 127 Ill. 425, are not analogous to the instant case, for the reason that there Sarah Walker, mother of the deceased legitimate child, from whom the inheritance came, died prior to the death of the deceased child, but that had she been living at the time of the death of the deceased child, she, alone, would have inherited the deceased's estate, and that *Bales*,

the illegitimate child of the mother, or his heirs, would take nothing. This argument is no doubt predicated upon the language of the court used in *Jenkins v. Drane*, 121 Ill. 217. In that case the facts were that Milburn Soper died seized of certain real estate. He was the legitimate son born to Leonard Soper and Mary Newman Soper. Mary Newman, prior to her marriage to Leonard Soper, had two illegitimate children. She died prior to the death of her son, and it was contended that these illegitimate children or their heirs could not inherit from Milburn Soper. This court on page 219 uses the following language: "If Milburn Soper's mother had been living at the time of his death she would have inherited his property. She being dead, then her illegitimate child would take it, because her mother, if living, would have taken it. If Deborah Burch was an illegitimate daughter of Milburn Soper's mother she would inherit through her mother equally with the legitimate children of the mother; and the lawful issue of an illegitimate person shall represent such person, and take, by descent, any estate which the mother would have taken if living. Such is the plain reading of the statute and such is the construction which we have recently given to it in the case of *Bales v. Elder*, 118 Ill. 436." The first sentence of the quotation might imply that Milburn Soper's mother, had she been living, would have taken all of the estate of Milburn Soper to the exclusion of her illegitimate children. That language was unnecessary to the decision of the case, and if it was intended by the court at that time to make the mother of an illegitimate child the sole heir to the estate of a legitimate child to the exclusion of the illegitimate child we are not disposed to follow it. We do not think, however, that is a fair construction to be placed on the language used in that case, because it was said further: "The statute confers upon illegitimates, * * * as respects the mother * * * and any person from whom the mother might have inherited if living, inheritable blood." The inheritable

blood is transmitted through the mother when the child is born,—not when the mother dies.

There is no question that Harry B. Morrow was the natural brother of the half blood of Ollie B. Campbell. If he had been the legitimate son of Sarah A. Morrow by a former husband he would have been a brother of Ollie B. Campbell of the half blood, and the distinction between the whole and half blood being abolished, he would have taken of his half-sister's estate an equal share with the brothers of the whole blood. The effect of the statute under consideration is to produce exactly that result in respect of his right of inheritance. In all respects Harry B. Morrow, through the inheritable blood transmitted from the mother, became the heir of Ollie B. Campbell as if he were a brother of the whole blood. He did not inherit from the common mother but inherited from Ollie B. Campbell by reason of the inheritable blood transmitted through the mother. (*Elder v. Bales, supra; Chambers v. Chambers*, 249 Ill. 126.) The words "if living" neither add to nor take from the clause under consideration. The meaning is plain that "an illegitimate child shall be heir * * * of any person from whom its mother might have inherited." It is plain the mother could not inherit if she were not living, therefore the parenthetical expression "if living" was inserted. We think the clear intention of the statute in question was to remove entirely the bar against illegitimates inheriting through the maternal line.

Entertaining the views we do as to the construction which should be placed upon the statute in question, the decree of the circuit court of Ford county must be reversed and the cause remanded to that court, with directions to overrule the demurrer.

Reversed and remanded, with directions.

(No. 12645.—Judgment affirmed.)

G. W. GALE, Defendant in Error, vs. M. L. MUNDY *et al.*
Plaintiffs in Error.

Opinion filed June 18, 1919—Rehearing denied October 10, 1919.

1. **CONTRACTS**—*when Supreme Court cannot weigh evidence.* Where there is evidence to support the plaintiff's claim in an action for damages for false representations in making a contract, the Supreme Court cannot weigh the testimony and determine on which side is the preponderance of the evidence.

2. **SAME**—*when a false representation is actionable.* A false representation does not amount to actionable fraud unless it is a representation of a fact which is known to be false by the party making it, is made to deceive and to induce action by the party to whom made, and does induce reliance thereon without opportunity for verification and under circumstances justifying belief.

3. **SAME**—*false assertions as to value are generally not actionable.* The general rule as between vendor and vendee is that false assertions respecting value are not actionable, as value is, at most, an opinion, and the antagonistic position of the parties is sufficient to put the vendee on his guard.

WRIT OF ERROR to the Second Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. BENJAMIN W. POPE, Judge, presiding.

NORTHUP, FAIRBANK & KLEIN, for plaintiffs in error.

BULL, LYTTON & OLSON, for defendant in error.

Mr. JUSTICE FARMER delivered the opinion of the court:

This cause comes to this court on a petition for a writ of *certiorari* to review a judgment of the Appellate Court for the First District affirming a judgment of the circuit court of Cook county for \$3000 in favor of G. W. Gale, the defendant in error here, who was plaintiff in the circuit court.

On the 14th day of June, 1913, Gale (hereafter referred to as plaintiff) and M. L. Mundy and R. W. Scott (hereafter referred to as defendants) entered into a written agreement whereby Gale agreed to convey to defendants certain described land in Oklahoma and Colorado and 290 shares of stock in two corporations mentioned, in exchange for 870 acres of land in Butler county, Iowa, which defendants agreed to convey to plaintiff for the land and stock agreed to be conveyed by him to them. The contract recites that the Iowa land is subject to a mortgage for \$45,000, and by the terms of the contract Gale was to take it subject to the mortgage, pay \$3300 cash, \$10,000 on or before August 15, 1913, and convey to defendants several hundred acres of Oklahoma and Colorado land described, the Colorado land subject to \$1800 incumbrance and the Oklahoma land to \$1500 incumbrance. By the terms of the contract defendants were given ten days to examine the land proposed to be conveyed to them and decide whether to accept or reject it. Deeds were exchanged between the parties on the 14th of September, 1913. The stock of the two corporations mentioned had been transferred by plaintiff to defendants some days before that time. This action was brought by plaintiff to recover damages, on the ground that he had been deceived and defrauded by false statements and representations of defendants as to the value of the Iowa land and its rental value.

The declaration contains two counts. The first count alleges plaintiff was induced to enter into the contract and accept the land in Iowa by the false and fraudulent representations of defendants that said Iowa land upon which crops were grown was rented for one-half the crops grown thereon and five dollars per acre for that part of the land not in crops; that said statements and representations were false; that the premises were leased for one-third of the grain crops grown thereon, two dollars per acre for all tame grass land and one dollar per acre for all wild grass land;

that defendants knew the facts as to the rental of said land at the time and before the contract and conveyances were made; that the plaintiff did not know said facts, had no means of finding them out and relied upon the statements of defendants, believing them to be true, whereby he was damaged in the amount of \$5000. The second count alleges plaintiff entered into a contract with defendants on June 14, 1913, to buy the Iowa land for the consideration mentioned in the contract; that by the terms of the contract plaintiff was to receive all the rents and profits from March 1, 1913, from the Iowa land, but defendants falsely, fraudulently and deceitfully stated to plaintiff and represented that the land was leased for one-half the crops grown thereon and five dollars per acre for that portion of the premises not in crop, which the plaintiff avers was about 370 acres; that if these statements had been true plaintiff would have received a rental of \$6000, but alleges that said statements and representations were not true; that the premises were rented for one-third of the crops grown thereon, two dollars per acre for the tame grass land and one dollar per acre for the wild grass land actually used by the tenant, by reason of which plaintiff would receive less than \$3000 rent. The second count also avers that the facts with reference to the rent of the land were well known to the defendants and were not known to the plaintiff; that he relied on the statements and representations of defendants, which were false, fraudulent and deceitful, whereby the plaintiff was defrauded and damaged to the amount of \$5000.

Defendants pleaded the general issue. The cause was not tried in the circuit court for more than three years after the suit was begun, and two days before the trial was entered upon defendants filed notice, by leave of court, that they would prove, by way of recoupment, fraudulent representations made by plaintiff to the effect that the Colorado land was free and clear of incumbrances except \$1800,

whereas in truth and in fact, as plaintiff well knew, it was subject to the payment of charges, assessments and taxes for irrigation purposes in the aggregate sum of \$7000; also that they would prove plaintiff represented to defendants that the Colorado land was all free and clear of incumbrances except one tract described, which was subject to incumbrances not exceeding \$1800, and plaintiff agreed to, and did, convey and warrant to defendants all of said tracts of land free and clear of all incumbrances; that said tracts were not free and clear as represented and warranted, but were, in fact, subject to charges, liens, assessments and taxes levied for irrigation purposes, amounting in the aggregate to \$7000.

The evidence of plaintiff and his witnesses supported his claim that defendants misrepresented the amount the land in Iowa was rented for, as alleged in the declaration, while defendants' evidence was directly conflicting to the plaintiff's and consisted of a denial of the misrepresentation of what the land rented for.

It is unnecessary to set out the evidence of the respective parties in substance, for it cannot be denied that the plaintiff's evidence supported his claim, and it is not for this court to weigh the testimony and determine on which side was the greater weight of evidence. Defendants offered no proof under their notice of recoupment.

The principal contention of defendants is that the court committed reversible error in refusing to give to the jury the following instruction asked by defendants:

“The court instructs the jury, as a matter of law, that if you believe from the evidence in the case that plaintiff has established his case by a preponderance of the evidence and that plaintiff was damaged, then, if you further believe that defendants have proved, by a preponderance of the evidence, that plaintiff by false and fraudulent representations in regard to the condition and value of the Colorado land in question in this case induced defendants to enter

into the contract of sale or exchange in evidence by reason of said defendants relying upon said representations of plaintiff, and that defendants have been damaged by said representations, the jury should reduce whatever damages, if any, you may find plaintiff suffered, by whatever damages, if any, you may find, from a preponderance of the evidence, defendants have suffered."

Under the proof in this case the refusal to give said instruction was not error. Defendant Mundy testified that he visited the Colorado land in August, 1913; that the 80-acre tract which the plaintiff had represented to be all seeded in alfalfa and worth \$150 per acre was not more than one-third in alfalfa; that he made inquiry as to its value, and learned that land just across the road from it, which he believed to be of about the same character of land, could be bought for \$60 per acre, and that the 160-acre tract, which plaintiff represented was worth \$16,000, was worth about \$25 per acre. Palmer, a witness for defendants, testified that he examined the Colorado land in November; that about one-fourth of the 80 was in alfalfa, and on the remainder of it the alfalfa appeared to have died for lack of water. This evidence was not objected to by plaintiff, and defendants claim that by the refusal of the instruction they were denied the benefit of that testimony. It is not every false representation that amounts to actionable fraud. The representation must be of a fact, knowledge of its falsity must rest with the party making it, and it must be made for the purpose of inducing action of the party to whom made. The false representations must be made to deceive or circumvent. *Cantwell v. Harding*, 249 Ill. 354; *Schwabacker v. Riddle*, 99 id. 343; *Walker v. Hough*, 59 id. 375.

It does not appear that when the contract was made defendants relied on any statements or representations of plaintiff as to the character and value of the land in Colorado, for by the terms of the contract they were given ten

days to examine the land and decide whether they would accept or reject the contract. They did not examine the land before accepting the contract but did examine it before the deeds were exchanged. It does not appear that defendants made any objection to conveying the Iowa land to plaintiff and receiving deeds to the Colorado and Oklahoma land from him at the time they were made or previously. So far as this record shows, the first complaint made by defendants of the value of the Colorado land was when they filed notice of recoupment, which was more than three years after the deeds were made. The representations relied on by defendants to sustain their claim by way of recoupment related to the value of the land in Colorado. The general rule as between vendor and vendee is that false assertions respecting value are not actionable, as value is, at most, an opinion, and the antagonistic position of the parties is sufficient to put the vendee on his guard. False representations, to be actionable, must be of a fact and induce reliance thereon without knowledge of the falsehood, without present opportunity or ability for verification and under circumstances justifying belief. (*Endsley v. Johns*, 120 Ill. 469.) The instruction which was refused told the jury that if plaintiff made false and fraudulent representations as to the condition and value of the Colorado land and that defendants were induced to perform the contract relying upon plaintiff's representations, in consequence of which defendants had sustained damage, the jury might reduce whatever damage, if any, the plaintiff had suffered, by the amount of damages defendants had suffered. Tested by the authorities above referred to, this instruction did not correctly state the law, and the court did not err in refusing it.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(No. 12251.—Reversed and remanded.)

MARY E. DEKE, Appellant, vs. IDA HUENKEMEIER,
Appellee.

Opinion filed June 18, 1919—Rehearing denied October 9, 1919.

1. DEBTOR AND CREDITOR—*conveyance in fraud of creditors is void only as to the complaining creditor.* All conveyances of any lands, goods or chattels made for the purpose of delaying or defrauding creditors or others of their actions or debts are void only as against such persons and their representatives as may be so delayed or defrauded and should not be set aside as between the parties who are equally guilty of the fraud.

2. HUSBAND AND WIFE—*wife defrauded by husband's deed can not set it aside as his residuary devisee.* Where a husband makes a conveyance in fraud of his future wife's marital rights the wife acquires no interest in the property as his residuary devisee and will not be entitled to have the deed set aside absolutely, without showing that previous to the conveyance she had, by a binding contract with the grantor or otherwise, acquired a right to have the property conveyed to her.

3. SAME—*when former decree limiting relief to present rights is not res judicata of subsequent bill.* A judgment or decree will not take effect upon rights not then existing, and where a wife is defrauded of marital rights by her husband's conveyance before marriage, a decree declaring the deed to be subject to her inchoate right of dower will not bar a subsequent suit by her, after the husband's death, to have the deed declared subject to her claim for widow's award, even though such decree denied her premature claim for relief as against her possible future right to alimony or widow's award.

4. SAME—*what rights are protected against a conveyance in fraud of marital rights.* Rights which will be protected against a conveyance intended to defraud a future wife of her marital rights are those rights which are guaranteed by law and which cannot be defeated by will, such as dower, homestead and the widow's award, and may also include separate maintenance or alimony when such a right has accrued by reason of the misconduct of the husband.

5. SAME—*rights as heir or devisee are not protected against a conveyance in fraud of marital rights.* The right of a husband or wife who takes property as devisee or heir of the other is not protected against a conveyance in fraud of marital rights, in the absence of some agreement or obligation that renders such a conveyance a fraud or otherwise inequitable.

6. SAME—*conveyance in fraud of marital rights places wife in position of defrauded creditor.* Where a husband makes a conveyance before marriage with intent to defraud his wife of her marital rights the wife stands in the same position as a defrauded creditor, and the law gives to her the same protection as to a creditor to the extent of such rights.

7. SAME—*when fact of fraud is established under doctrine of estoppel by verdict.* A former decree declaring a deed to be subject to the inchoate right of dower of the grantor's wife on the ground that the deed was made in fraud of her marital rights, will, under the doctrine of estoppel by verdict, establish the fact of the fraudulent conveyance in a subsequent suit to have the deed declared subject to the widow's award.

8. RES JUDICATA—*when a judgment or a decree is conclusive.* Where the court has jurisdiction and renders a final decree or judgment, which is affirmed by the Supreme Court, the same is conclusive upon the parties although the decree or judgment may be erroneous.

9. SAME—*what determines whether a matter is res judicata.* In ascertaining whether a particular matter has become *res judicata* the reasoning of the court is less regarded than the judgment or decree itself and the premises which it necessarily affirms, and to render a matter *res judicata* the judgment must proceed from a court having jurisdiction, and the action must be between the same parties and for the same purpose.

APPEAL from the Circuit Court of Stephenson county; the Hon. JAMES S. BAUME, Judge, presiding.

R. R. TIFFANY, and DOUGLAS PATTISON, for appellant.

ROBERT A. HUNTER, and FISHER, NORTH, WELSH & LINSOTT, for appellee.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

Appellant, Mary E. Deke, filed her amended bill against appellee, Ida Huenkemeier, October 17, 1917, in the circuit court of Stephenson county, to set aside a certain fraudulent deed of her deceased husband, Joseph Deke, to appellee, his only child, dated July 31, 1905, as a cloud on her title to the real estate therein described, which she claims as his devisee, or, in the alternative, to have appellee declared to hold said real estate as trustee and to have it subjected to

the payment of appellant's award as widow and to the payment of the legacies mentioned in her husband's will and the claims allowed against his estate. The court sustained appellee's demurrer to the bill, and on appellant's election to stand by her bill, entered a decree dismissing it for want of equity.

The principal question presented for our decision is the claim of appellee that appellant is barred in this suit by a former decree of the circuit court on a similar bill between these same parties, and to which Joseph Deke, and Henry Huenkemeier, then husband of appellee, who are both dead, were made parties defendant. The bill filed in that case was filed for the purpose of setting aside said deed on the ground that it was without consideration and made with intent to defraud appellant out of her marital rights in the property of Joseph Deke. The court found for this appellant, and that for the purpose of defrauding Johanna Reichel out of any judgment which she might recover against Joseph Deke in her suit for damages for an alleged breach of promise of marriage then pending in said court and for the purpose of preventing appellant from obtaining any interest in the property in case she should become his wife, he made said deed without consideration, and that appellee persuaded him to make the deed and accepted it for the same fraudulent purposes; that the appellant afterwards married Deke upon his representation to her that he owned all of said property, of the estimated value of from \$25,000 to \$35,000, and that she believed the same to be true, etc. The court further found and decreed that appellant was entitled to her inchoate right of dower in said premises, and that in case she survived him and should demand it she should have and be entitled to dower, provided she should not previously release, convey or forfeit the same in any manner; that said lands be and they are charged with her said rights, and that, subject to the right of dower, the conveyance to appellee continue in full force and effect as between

appellee and her father and grantor. That decree was affirmed by this court on the appeal of this appellant, and cross-errors were assigned by the appellee, as will appear in *Deke v. Huenkemeier*, 260 Ill. 131, to which reference is here made for a more complete statement of the case and the holdings therein by this court. The bill now before us alleges all the averments of the former bill, and with it, and made a part thereof as exhibits, are filed copies of the first bill, of the deed, the answers to the first bill, the master's report, objections to the report and the exceptions, the first decree of the circuit court, the decision and opinion of this court affirming the decree, and a copy of the will of Joseph Deke, to which no reference was made in the former suit. The bill then sets up the allegations under which appellant bases her new claims, the death of her husband January 5, 1917, the probating of his will and the allowance of her award of \$2000; that subject to two legacies of \$500 each bequeathed to appellee's children, Fern and Earl Huenkemeier, and subject to his debts and funeral expenses, Deke devised and bequeathed to appellant all the residue of his estate, of every kind and nature, of which he might die seized or possessed or to which he might be entitled or may be found to be entitled; that there is no property or funds left by deceased to pay the award, and that it cannot be paid unless the real estate so deeded is subject to the payment thereof; that at no time after their marriage did the testator own more than \$150 worth of property, real or personal, other than the lots so deeded, and that appellee procured her father to execute, and that he executed, said deed with the intent to defraud appellant of all her marital rights and of all other rights she might acquire in said lots, etc.

All questions of *res judicata* and estoppel by verdict argued by both parties are properly presented by the bill and the demurrer, and that is conceded. *Hofmann v. Burris*, 210 Ill. 587.

The claim of appellant that she is entitled to have the deed of Joseph Deke to appellee declared absolutely void and the fee simple title to said lots vested in her as devisee of her husband, subject only to the payment of the legacies, debts, etc., cannot be sustained in any view of this case. It has been many times declared by the decisions of this court that all conveyances of any lands, goods or chattels, had or made of purpose to delay or defraud creditors or others of their actions or debts, shall be taken, only as against such persons and their representatives as shall or might be so delayed or defrauded, to be utterly void. As between the parties to such a fraudulent conveyance who are equally guilty of the fraud, the decree setting aside such a deed should merely declare it void as to the complaining creditor and should not set it aside as between the parties. (*People v. Keithley*, 225 Ill. 30.) The same rule applies in cases where the wife is defrauded of any of her marital rights and seeks to have the conveyance set aside for such fraud, and it was so held in the former case of *Deke v. Huenkemeier*, *supra*, and it was decided and held as the law of the case. Joseph Deke after that fraudulent deed never had any interest that he could assert, convey or devise by will, and no subsequent grantee or legatee or devisee or heir, merely as such, could take or have or successfully assert, as such, any interest in such lands or lots. Appellant, as such devisee, acquired no more right or interest therein than would any other devisee.

On appellant's first appeal she made the claim that she was entitled to have the deed in question set aside absolutely, so as to bind the real estate for her necessities as a wife, which she insisted was one of her marital rights, and also for the purpose of enhancing and protecting her future contingencies for separate maintenance, alimony and award as a widow, in case any such claims should actually arise and be established. This court held that she was only entitled to have the deed set aside as to her then existing rights, and was not entitled to have it set aside to secure to her

her necessities or support as a wife or to have the deed set aside absolutely to protect any future claim that might arise or come into being. In other words, her right was held to be analogous to any other creditor's right, and that no character of claim then existing or that might thereafter accrue could then, or at any time thereafter, give her the right to have such deed absolutely set aside. That is the law of this case now, without regard to the question whether or not the lower court and this court held correctly or erroneously. Where the court has jurisdiction and renders a final decree or judgment the same is conclusive upon the parties after it has been affirmed by this court; and this is so although the decree or judgment may be erroneous. (*Graceland Cemetery Co. v. People*, 92 Ill. 619.) The deed, as between the parties thereto, is still in full force and effect. The former decree so declares and that it shall so continue, and every party to that decree is bound by it. And if no such suit had ever been brought and this suit were appellant's first suit, it is absolutely clear, under the law, that as a devisee, legatee or subsequent grantee she could not successfully maintain any bill to set the deed aside absolutely, without a showing that previous to said deed she had, by a binding contract with the grantor or otherwise, acquired a right to have said lots conveyed to her and that such deed was in fraud of that right. In asserting her claim as a devisee she is asserting no marital or other right out of which she was defrauded.

As to the appellant's right and claim to have by this bill the deed set aside and the real estate subjected to the payment of her award a different question arises. This claim had not accrued to her when the former decree was entered. She was then a married woman,—the wife of Joseph Deke,—not his widow. As was said in the former decision of this court, the only right she acquired by her marriage was her inchoate right of dower in her husband's real estate deeded in fraud of her marital rights. Her

then premature claims which she insisted should be protected as aforesaid, such as separate maintenance, alimony and a widow's award, would amount to nothing unless by reason of misconduct of her husband she should in the future become entitled to separate maintenance or alimony or unless she survived her husband. She was not seeking in the former suit to establish any such a claim, but merely to protect the same, in case any one or more of the claims should accrue, by having the deed absolutely declared void. We cannot, therefore, understand how her present claim for award is barred by the former decree and the decision of this court affirming the same, by reason of the doctrine of *res judicata* or estoppel by verdict. She was asking for relief she could not have then or at any other time. Even if we may say she was also asking that the land be in some way charged by her contingent claims aforesaid, that was a relief she could not have, and any action or claim she was taking or making was premature and at a time when she had no such accrued right or even a knowledge that she ever would have such. To make a matter *res judicata* the judgment must (1) proceed from a court having jurisdiction, (2) be between the same parties and (3) for the same purpose. (1 Freeman on Judgments, sec. 252; *Markley v. People*, 171 Ill. 260.) The former decree is conclusive only as to facts directly and distinctly put in issue and the finding of which is necessary to uphold the decree. In ascertaining whether a particular matter has become *res judicata* the reasoning of the court is less regarded than the judgment or decree itself and the premises which it necessarily affirms. (1 Freeman on Judgments, secs. 258, 259.) Under no circumstances will a judgment or decree take effect upon rights not then existing. (1 Freeman on Judgments, sec. 329; 15 R. C. L. 977-982; *Kenealy v. Glos*, 241 Ill. 15.) The former decree is no bar to appellant's right of recovery of her award, if such right she has.

It has long been the established law that the husband and wife each acquire certain marital rights in the other's property, and that those rights are protected against conveyances or other dispositions thereof made with intent to defeat such rights. Those rights are commonly and generally understood to be the rights guaranteed to them by law and such as one cannot bar or defeat by will, such as dower, homestead and the widow's award under the law of this State. The ancestor may generally by will exclude his children entirely from all participation in his estate, but not his wife. (*Thayer v. Thayer*, 39 Am. Dec. 211, and note.) When the husband or wife takes property by descent or as an heir of the other, such right is not so protected against such a conveyance in the absence of some agreement or obligation that renders such a conveyance a fraud or otherwise inequitable. (*Brinkley v. Brinkley*, 128 N. C. 503.) The right of a wife to separate maintenance and to alimony, when such a right has accrued by reason of the misconduct of the husband, will, of course, be protected against such a conveyance when it is made with intent to defeat such a right. (*Botts v. Botts*, (Ky.) 74 S. W. Rep. 1093; *Fahey v. Fahey*, (Colo.) 18 L. R. A. [N. S.] 1147.) It has also been held by a court of very high standing that a conveyance made by the husband before marriage should be set aside as in fraud of his wife's alimony rights where such conveyance was kept secret from the intended wife and not recorded until after the marriage. (*Goff v. Goff*, 60 W. Va. 9.) The wife in all such cases is considered as in the same position as a defrauded creditor.

In this State the rule is well settled that if a conveyance is voluntary and without consideration and is made with intent to defraud of her marital rights any person whom the grantor should marry, whether she had been selected as a wife or not, the same may be set aside as to such rights. With respect to her marital rights the law affords the same protection to a wife as to a creditor, and a voluntary dis-

position of property made with specific intent to defraud a future wife of her marital rights is void, the same as though made with intent to defraud future creditors. (*Higgins v. Higgins*, 219 Ill. 146; *Dunbar v. Dunbar*, 254 id. 281.) In *Blankenship v. Hall*, 233 Ill. 116, this court held that a wife defrauded of her marital rights by such a conveyance was entitled to recover, after her husband's death, her homestead, dower and personal award as widow. The Supreme Court of Indiana held in *Bookout v. Bookout*, 150 Ind. 63, that such a conveyance made by the husband after the engagement and before his marriage should be set aside, after his death, as to the widow's right to dower and her lien for \$500 allowed her by statute. Appellant in this case, when she was allowed her widow's award, was in a like position to a future judgment creditor with two claims, one due and in judgment and the other in a note and not due, and who had been defrauded by a deed of his debtor made with intent to defraud him. He would have a right to file a bill to set aside the deed as to his first judgment, and when his other claim became due he would have the right to take judgment on the note and file his second bill.

We think that appellant's claim was in no way barred by her former decree and that the learned chancellor was in error in sustaining appellee's demurrer to the bill as to her claim for her award. Appellant's contention, which does not appear to be contested, is correct that for the purposes of this suit the former decree established the fact that the deed in question was made with intent to defraud her of her marital rights or of her widow's award, under the doctrine of estoppel by verdict. *Markley v. People*, *supra*; *Hanna v. Read*, 102 Ill. 596.

The decree of the circuit court is reversed and the cause remanded, with directions to overrule appellee's demurrer to the bill as to the allegations with reference to the widow's award.

Reversed and remanded, with directions.

(No. 12571.—Judgment affirmed.)

GRANGER FARWELL, Plaintiff in Error, vs. THE PYLE-NATIONAL ELECTRIC HEADLIGHT COMPANY, Defendant in Error.

Opinion filed June 18, 1919—Rehearing denied October 24, 1919.

1. CORPORATIONS—*directors of corporation occupy position of trustees for stockholders.* The directors of a corporation are intrusted with the management of its business and property for the benefit of all the stockholders and occupy the position of trustees for the collective body of stockholders in respect to such business.

2. SAME—*directors cannot take advantage of their position for personal gain.* The rule in regard to the duty of directors, as trustees for the stockholders, reaches further than the transactions occurring directly between the directors and the corporation and embraces every relation in which there may by any possibility be a conflict between that duty and their own personal interests.

3. SAME—*when a director cannot buy corporate obligations at discount and enforce payment in full.* If it is for the interest of a corporation to buy its bonds or obligations at a discount and it is financially able to do so, a director will not be permitted, for speculation in his own interest, to buy the obligations at a discount and enforce payment in full against the corporation.

4. SAME—*when a director acquires an adverse interest by assignment of royalty contract.* Where inventors have entered into a contract with a manufacturing corporation for a monthly payment of five per cent of the gross receipts from sales of manufactured articles using their invention, a director who has purchased the interest of the inventors in the royalty contract acquires an interest adverse to that of the corporation, and in an action of account against the corporation he can enforce no equity for himself in such interest without showing that his act was for the benefit of the corporation.

5. SAME—*director seeking to enforce an adverse interest must prove consent of all stockholders.* A director of a manufacturing corporation who seeks to enforce, by an action of account against the corporation, an adverse interest which he has acquired by the purchase of the rights in a royalty contract, cannot take advantage of the doctrine that the violation of his fiduciary duty as trustee will be regarded in equity only so far as it is necessary to protect innocent and non-assenting stockholders, without showing who all the stockholders were and whether they consented to his action.

6. SAME—*knowledge of stockholders is necessary before laches can defeat their rights.* Stockholders have a right to rely upon the

fidelity of the directors to their trust, and they are not bound to know or exercise reasonable diligence to discover the facts which it is the duty of the directors to disclose by reason of the relation of trust and confidence arising out of their position.

7. SAME—*majority of directors or stockholders cannot ratify their own breach of trust by directors.* A violation of their duty by the directors of a corporation cannot be ratified by the action of those who were guilty of participation in the wrongful acts, even if they constitute a majority of the directors or stockholders.

8. SAME—*when court will not enforce equities against stockholders nor between directors.* Where a director who has acquired an interest adverse to the corporation brings an action of account against the corporation, it is no answer to a clear defense by the corporation that equities exist against certain of the stockholders who are not parties to the suit; and where other directors were also engaged with complainant in the breach of trust a court of equity will not ascertain their equities in a proceeding for the distribution of profits among them.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. MARTIN M. GRIDLEY, Judge, presiding.

JONES, ADDINGTON, AMES & SEIBOLD, (S. S. GREGORY, W. CLYDE JONES, KEENE H. ADDINGTON, ROBERT LEWIS AMES, MORRIS ST. P. THOMAS, and WALTER HAMILTON, of counsel,) for plaintiff in error.

BUTZ, VON AMMON & JOHNSTON, MILLER, GORHAM & WALES, PARKER & CARTER, and RECTOR, HIBBEN, DAVIS & MACAULEY, (FRANCIS LACKNER, EDWARD RECTOR, FRANCIS W. PARKER, FREDERIC E. VON AMMON, AMOS C. MILLER, and DONALD M. CARTER, of counsel,) for defendant in error.

Mr. CHIEF JUSTICE DUNN delivered the opinion of the court:

On a bill filed against the Pyle-National Electric Headlight Company in the superior court of Cook county by Granger Farwell, in his own behalf and as trustee, the court

rendered a decree for an accounting, from which the complainant, being dissatisfied with the basis fixed for taking the account, appealed to the Appellate Court for the First District. The defendant assigned cross-errors, which were sustained. The decree was reversed and the cause was remanded, with directions to dismiss the bill. Upon the petition of the complainant a writ of *certiorari* was awarded to bring up the record for review.

The Pyle-National Electric Headlight Company was incorporated in 1897 under the laws of New Jersey to manufacture and deal in electric headlights, and on February 9, 1897, George C. Pyle and Frank H. Ewers, who were the owners of four patents for steam turbines and three patents for electric lamps, of which Pyle was the inventor, entered into a written contract whereby they granted to the company an exclusive license to manufacture and sell patented articles and devices for all purposes for which such patented articles or devices, or parts thereof, could be utilized under the patents so assigned or any patents or improvements that might thereafter be made to accomplish the same or similar purposes. The consideration for this agreement was \$500 cash, \$4500 to be paid February 1, 1898, the issue to the owners of the patents of all capital stock of the corporation, of the par value of \$700,000, except ten shares, and the agreement of the corporation to pay monthly a royalty of five per cent of the gross receipts derived from sales made under the license, such royalty to be not less than \$150 for each calendar month from January 1, 1898. The president of the corporation was Royal C. Vilas and the secretary Perry Trumbull. The record does not show to whom the 6990 shares of the capital stock which the contract provided should be issued to Pyle and Ewers were transferred, but it appears that Vilas and members of his family have during the entire existence of the corporation owned a majority of the stock, though the number of shares so owned by them or by any of them is not

disclosed. Neither does the evidence show the names of the stockholders outside the Vilas family, or the number of their shares, except in a few instances. In January, 1898, an extension of a year on the \$4500 payment was agreed on and evidenced in writing, the contract of February 9, 1897, being in all other respects confirmed. The company was then manufacturing and selling the headlights and paid royalties until March 1, 1898, but soon afterward began a suit in the superior court of Cook county charging that Pyle and Ewers had procured the agreement of February 9, 1897, by fraudulent representations or concealments. This suit was settled in October, 1898, the royalties due October 1, 1898, were paid and a written agreement was entered into for the dismissal of the suit at the complainant's costs, for a further extension of the \$4500 payment to January 1, 1900, and for the extension of the time of payment of royalties accruing for the period from October 1, 1898, to the end of December, 1899, to January 1, 1900.

In the latter part of 1898 or beginning of 1899 Granger Farwell became a director of the Pyle-National Electric Headlight Company at the request of Royal C. Vilas, who gave Farwell ten shares of stock to qualify him for that position. Farwell afterward purchased more stock and continued to be a director until January, 1912, except for the period from February 7 to May 2, 1900, during which time no directors' meeting was held. On June 5, 1899, he obtained from Pyle and Ewers an assignment of their contract of February 9, 1897, with the Pyle-National Electric Headlight Company as well as of the legal title to the patents mentioned in that contract, and an agreement for the assignment of two other patents when issued upon applications then on file in the patent office,—one for a rotary engine governor and the other for an arc lamp,—of which patents the Pyle-National Electric Headlight Company would become the exclusive licensee by virtue of the agreement of February 9, 1897. These patents were subse-

quently issued and duly assigned to Farwell. The consideration of these assignments was \$14,473.10, which Farwell paid. At the time of the assignment the payment of \$4500, which had been extended to January 1, 1900, and the royalties accruing since October 1, 1898, the payment of which had been extended to the same date, were unpaid and they were afterward paid to Farwell. The purchase of the patents and all the contracts was made by Farwell for the joint benefit of Vilas and himself. Vilas soon after sold to Perry Trumbull one-third of his one-half interest. Vilas was president, Trumbull secretary, and Vilas, Trumbull and Farwell directors of the corporation, and the three were a majority of the board of directors. They continued to be such majority until February, 1901, when the number of directors was increased to seven, but at the same time Vilas and Farwell were appointed an executive committee, to which the board of directors delegated all its powers. Vilas died in 1904 and was succeeded as president by his brother, William Vilas, who died in 1908. Carrie A. Vilas, the widow of Royal C. Vilas, was then president until her death, in 1910, when her son, Royal C. Vilas, Jr., became president. He continued to hold that office when this suit was brought. After the assignment of the patents and contract to Farwell the \$4500 payment and the deferred royalties, which were accumulating at the rate of more than \$3000 a year, payment of which had been postponed to January 1, 1900, were paid to him, and the monthly payment of royalties under the contract continued to be made in increasing amounts until 1912, the total amount of royalties so paid exceeding \$144,000. After the death of Vilas and Trumbull the monthly payments were made, one-half to Farwell, one-third of one-half to Trumbull's executor and two-thirds of one-half to Vilas' heirs.

On May 14, 1912, Farwell filed this bill for himself, the heirs of Vilas and the executor of Trumbull's will, alleging that the company had manufactured and sold large quan-

tities of the articles mentioned in the contract under the patents and by virtue of its license and had built up a large, lucrative and prosperous business, but that for large quantities of the articles so made and sold it had not paid the royalties provided in the agreement. The defendant filed an answer, which was afterward amended, admitting the execution of the agreements and assignments alleged in the bill; averring that it had for many years paid royalties on the basis of the total sales of the electric headlight equipments embodying the inventions covered by the patents, insisting that upon a proper construction of the agreement it was not liable to pay royalties on the basis claimed by the complainant; alleging that it had discontinued the use of all the inventions covered by the patents in the construction of its electric headlight equipments, and denying that any royalties were due under the terms of the contract.

After the cause had been referred to the master and the evidence taken, the defendant, at the hearing of exceptions to the master's report, obtained leave to file, and filed, an amendment to its amended answer, alleging that Farwell, Vilas and Trumbull were directors of the corporation at the various times which have been mentioned and stated their relation to the management of the corporation, stating that it would have been for the best interest of the corporation for Farwell to have bought the rights of Pyle and Ewers for the company at the price paid, which was much less than their real value, and that Farwell having obtained knowledge of their real value by reason of his position as a director, should have bought them for the company, which could have paid for them, but that Farwell did not consult the other stockholders and directors and disclose to them the opportunity of making such purchase but took and continued in a position antagonistic to the interest of the company; that he should be held to have acquired the rights purchased for the benefit of the company and not permitted to claim any rights under the purchase except the right

to be reimbursed for the money paid; that he had been so reimbursed; that the defendant was entitled to all the rights acquired by Farwell, and that the stockholders other than Vilas, Trumbull and Farwell at no time consented to or ratified the assignment.

Before the master, and on the hearing by the chancellor, many questions were considered involving the construction of the contract between the corporation and Pyle and Ewers, the effect of the conduct of the parties upon such construction, questions of patent law, the Statute of Limitations, and other questions. The chancellor found that under all the circumstances the corporation was not entitled to claim the benefit of the assignment to complainant of the contract and the patents for itself and that the complainant was not barred from a recovery because of his being a director in the corporation at the time he acquired such contract and patents. As to the other questions in controversy, the decree did not entirely sustain the contentions of either party but sustained some of the contentions of each. The Appellate Court made no decision on any of these latter questions, but being of the opinion that the relation of the complainant to the corporation was of such a fiduciary character as prohibited him from acquiring an adverse interest in the contract and patents, reversed the decree of the superior court for that reason and directed the dismissal of the bill.

At the end of 1899 the net assets of the corporation above all its liabilities amounted to more than \$26,000, and its cash and accounts receivable from railroads were more than \$40,000 and exceeded its debts nearly \$10,000. In that year the company made a net profit of over \$23,000, being more than three per cent on its capital stock of \$700,000, which represented the value of its patent rights. The royalties paid in that year were over \$3000, in 1900 over \$4400, in 1901 over \$5900. These payments and the deferred payment of \$4500 more than reimbursed the com-

plainant for the money he advanced, and the payments of royalties continued regularly after 1901.

The directors of a corporation are intrusted with the management of its business and property for the benefit of all the stockholders and occupy the position of trustees for the collective body of stockholders in respect to such business. They are subject to the general rule which prevails in regard to trusts and trustees, that they cannot use the trust property, or their relation to it, for their own personal gain. It is their duty to administer the corporate affairs for the common benefit of all the stockholders and exercise their best care, skill and judgment in the management of the corporate business solely in the interest of the corporation. (3 Thompson on Corp. sec. 4009 *et seq.*) They cannot have or acquire any personal or pecuniary interest in conflict with their duty as such trustees. (*Hooker v. Midland Steel Co.* 215 Ill. 444.) The mere statement of the rule gains its approval. In *Nowak v. National Car Coupler Co.* 260 Ill. 260, the question of the disqualification of a director to purchase property of the corporation was considered, and, citing previous cases, it was said: "The general rule to be derived from the decisions is, that a director of a solvent corporation may trade with, borrow money from or loan money to the corporation or purchase its property, but in doing so he must act fairly and be free from all fraud and oppression and must impose no unfair or unreasonable terms. While a director is not disabled from purchasing the property of his corporation, the transaction will be subjected to the closest scrutiny by a court of equity, and if it was not conducted with the utmost fairness, to the end that the full value of the property should be obtained, the court will set it aside." There is here no purchase of property from or by the corporation or contract between the director and the corporation which is sought to be set aside, but the rule in regard to the duty of directors, as trustees for the stockholders, reaches further than

to transactions occurring directly between the directors and the corporation. In *Gilman, Clinton and Springfield Railroad Co. v. Kelly*, 77 Ill. 426, it was stated that the same rule applies to directors as to all persons acting in a fiduciary capacity, which requires the utmost fidelity to the interests of the *cestui que trust*; that it is a breach of duty for the directors to place themselves in a position where their own individual interests would prevent them from acting for the best interests of those they represent, and that the rule embraces every relation in which there may by any possibility arise a conflict between the duty to the person with whom the trustee is dealing or on whose account he is acting and his own individual interest. "The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. * * * In this conflict of interest the law wisely interposes. It acts, not on the possibility that in some cases the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence and supersede that of duty." (*Nichoud v. Gerod*, 4 How. 503.) It is conceded that a director may loan money to the corporation or purchase its bonds. It has not been decided in this State that he may purchase the corporation's outstanding obligations at a discount and enforce them in full, though it was intimated in *Higgins v. Lansingh*, 154 Ill. 301, that he may, if he act fairly and for the interest of the corporation. The intimation carries with it the corollary that he may not make such purchase for speculation in his own interest and enforce payment for the full amount against the corporation. If it is for the interest of the corporation to buy its bonds at a discount and it is financially able to do so, a director will not be permitted to buy those bonds at a discount and enforce payment in full against the corporation. In *Harts v. Brown*,

77 Ill. 226, where it was held that the directors of a corporation may trade with, borrow from or loan money to the corporation on the same terms and in like manner as other persons, may purchase the property and stock belonging to it in the same manner as though they were not directors, and may purchase its bonds and other indebtedness, it is still said that if the company had possessed money or property, or any assets that could have been converted into money, with which to redeem and discharge its debts, then the purchase of them would have been in bad faith. The contract of the corporation with Pyle and Ewers was not a liquidated demand against the corporation. It was an executory contract continuing during the life of the patents, calling not for the payment of certain sums of money at stated times, but for the payment, monthly, of five per cent of the gross receipts from sales made by virtue of the contract. The interest of Pyle and Ewers was necessarily adverse to that of the corporation, and under the principles which have been referred to, a director of a corporation could not acquire that interest for himself unless he could make it appear that his act was for the interest of the corporation. The conflict of the individual interest of Farwell with that of the corporation, which it was his duty as a director to protect, is illustrated by the fact that he is claiming in this suit that he is entitled to royalties on sales of whole electric headlight equipments and also on all sales of repairs and replacement parts, while the corporation contends that the royalties are payable only on the separate lamps, turbines and governors and not on the whole equipment and not on repair and replacement parts. Royalties had been paid on the whole equipments and not upon repair or replacement parts, and the court held that they should have been paid, not upon whole equipments but upon the patented articles and devices and upon repair or replacement parts. These are not the only differences of construction but are merely illustrative. In becoming the owner of the

contract with Pyle and Ewers, Farwell placed himself in a position where his individual interest was in conflict with his duty to the corporation of which he was a director. He had no right to buy the contract for his own profit but the corporation was entitled to the benefit of his bargain. It was solvent and there is nothing to indicate that it was unable to purchase the contract. Farwell has been re-paid many times over. The directors were bound to give the corporation the benefit of the royalties instead of taking it to themselves.

The record contains no evidence as to how many stockholders there were on June 5, 1899, or at any time since, who they were, whether they consented to the assignment to Farwell or had any knowledge of it, or from whom or how they obtained their stock. Therefore the argument of the plaintiff in error that a violation of his fiduciary duty by a trustee will only be regarded in equity so far as it is necessary to protect innocent and non-assenting stockholders is not applicable. The bill was filed by the plaintiff in error to enforce an accounting based upon an assignment which, upon the facts appearing in the record, it was a breach of his duty, as a director, for the plaintiff in error to obtain for himself. If all the stockholders assented to the assignment the corporation would not afterward be heard to oppose it, but it is not to be assumed, without evidence, that any stockholder assented. Royal C. Vilas did so and Trumbull, but the record is silent as to others. The burden of proof on this question is on plaintiff in error.

So far as the questions of ratification and *laches* are concerned, knowledge of the stockholders is necessary before their act or failure to act can bar their rights. They had a right to rely upon the fidelity of the directors to their trust, and were not bound to know or exercise reasonable diligence to discover the facts which it was the duty of the plaintiff in error and the directors associated with him to disclose by reason of the relation of trust and confidence

arising out of their position. (*Farwell v. Great Western Telegraph Co.* 161 Ill. 522; *Voorhees v. Campbell*, 275 id. 292.) The violation of their duty by the directors cannot be ratified by the action of those who were guilty of participation in the wrongful acts, even though they constituted a majority of the directors or of the stockholders. (*Klein v. Independent Brewing Ass'n*, 231 Ill. 594.) It was not to be expected that the corporation, so long as it was for the personal interest of the directors controlling a majority of the stock to keep the contract for royalties in force for their private benefit and to collect the royalties for their individual use, would seek to avail itself of its right to secure for itself the benefit of the assignment to the unfaithful trustee. The answer did not originally rely upon the breach of duty of the director as a defense though it denied that any royalties were due the complainant, but it was in the discretion of the court to permit the amendment of the answer on the hearing. This suit is against the corporation and is brought by the unfaithful director, who comes into equity to obtain the benefit of a contract which it is apparently a violation of his trust to enforce for his own benefit. The stockholders are not parties to the suit and are represented only by the corporation and their rights can be protected only through the corporation. If a decree should be rendered against the corporation it would have to be paid out of the funds of the corporation and the payment would fall proportionately on each stockholder. The complainant seeks to enforce a claim to which the corporation, on settled equitable principles, has a clear defense. It is no answer to this defense that equities exist against certain of the stockholders. If such equities do exist they cannot be enforced in a suit to which stockholders are not parties, and a court will not be astute to ascertain equities in the distribution of profits among directors jointly engaged in the breach of trust.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(No. 12618.—Reversed and remanded.)

HELENA HOOPER, Admx., Defendant in Error, vs. THE
ADAMS EXPRESS COMPANY, Plaintiff in Error.

Opinion filed June 18, 1919—Rehearing denied October 27, 1919.

1. NEGLIGENCE—*evidence of rate of speed of vehicle is admissible under count charging negligence of the driver.* In an action to recover for the death of a pedestrian who was run over by a wagon in a crowded street, the withdrawal of a count which expressly charged the driving of the horse and wagon at an unlawful rate of speed does not preclude the plaintiff from relying upon evidence as to the rate of speed to sustain a judgment under another count charging that the defendant negligently caused the vehicle to run over the deceased.

2. SAME—*when evidence must show deceased was in exercise of ordinary care for his own safety.* In an action to recover for the death of a pedestrian who was run over by a wagon while crossing a busy thoroughfare, it is as essential to the plaintiff's right to recover to show that the deceased was in the exercise of ordinary care for his own safety as to show that the defendant was negligent, and where the evidence fails to show such care an instruction to find for the defendant should be given.

WRIT OF ERROR to the Second Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding.

SABATH, STAFFORD & SABATH, (CHARLES B. STAFFORD, and THOMAS M. ZASADIL, JR., of counsel,) for plaintiff in error.

LITSINGER, HEALY & REID, (JAMES J. FINN, of counsel,) for defendant in error.

Mr. CHIEF JUSTICE DUNN delivered the opinion of the court:

This writ of error brings before us the record of the Appellate Court for the First District, which affirmed a judgment of the circuit court of Cook county for \$2500

against the Adams Express Company in favor of the defendant in error for negligently causing the death of her husband, Montgomery C. Hooper. The error complained of is that the court refused to direct a verdict for defendant.

The deceased was an interior decorator. While crossing Madison street at Fifth avenue he was struck by a horse drawing a wagon of the plaintiff in error and driven by one of its employees. He was knocked down, run over and received injuries from which he died within a few hours. The accident occurred about six o'clock in the evening of June 3, 1914. There were double street car tracks in each street. The deceased, coming from the west on the south side of Madison street with George Baskett, a fellow-workman, arrived at the southwest corner of Madison street and Fifth avenue and started to cross the street to the northwest corner. The traffic was heavy and many people were walking across. An east-bound street car was standing a few feet west of the west crossing, discharging passengers. In front of it, in the railroad track, was a wagon drawn by a team of ponies. The deceased and his companion started from the south side of the street about a foot west of the cross-walk. The deceased was to the left of Baskett and a little behind him. They went in front of the street car, between it and the wagon in front of it, and as they were proceeding north they saw the plaintiff in error's horse and wagon coming from the east, as Baskett testified, at a pretty fast trot. The left wheels of the wagon were in the west-bound track and the right wheels north of it. Baskett called to Hooper to look out, and both jumped to the northwest in an effort to get over to the north sidewalk. Baskett was struck by the north shaft and knocked down on the sidewalk. Hooper, who was slightly behind, was knocked down by the horse or wagon and run over. The wagon came from the east, going west on the north side of Madison street east of Fifth avenue. When it reached Fifth avenue the traffic was moving north and south in that street and

the wagon stopped in the west-bound street car track, being the first wagon east of Fifth avenue facing west. When the whistle blew for the east and west traffic the driver started his horse and was just coming to the west cross-walk when the east-bound car started.

The declaration consisted of two counts, the first of which charged that the defendant carelessly, wrongfully and negligently caused the horse and wagon to run into and against and strike with force and violence the deceased, and the other charged the driving of the horse and wagon at an unreasonable and unlawful rate of speed. The court withdrew the latter count from the jury. There was no evidence to sustain the other count unless there was evidence of an excessive rate of speed, for no other negligence was shown. Evidence as to the rate of speed was admissible under the count which remained, and the withdrawal of the other count does not preclude the defendant in error from relying upon such evidence to sustain the judgment under the first count.

Another witness besides Baskett testified that the horse was going at a very fast trot. This was John Callaghan, who was standing at the northwest corner of Madison street and Fifth avenue. He was facing east and did not see either Hooper or the horse and wagon before Hooper was struck. His attention was attracted by a cry and he turned and saw the wagon pass over Hooper. There was also testimony as to the distance the wagon traveled after Hooper was struck.

Conceding that in spite of the withdrawal of the count alleging excessive speed the plaintiff was entitled to submit the evidence on that question to the jury under the first count, there yet remains the question of the deceased's contributory negligence. It is as essential to the plaintiff's right to recover to show that deceased was in the exercise of ordinary care for his own safety as to show that the defendant was negligent. Baskett says that he and Hooper

passed in front of the street car, which was standing still. They were not on the cross-walk, where pedestrians may be expected in crossing a street. The motorman, after receiving the signal to go over the crossing, waited for the wagon to proceed far enough ahead to make it safe for the car to start. Just as he was about to start, or after he had started, the car, but before it reached the crossing, two men passed in front of his car, and he paid no more attention to them until he heard a noise as he was about to cross the cross-walk, when he glanced over to the left and saw a horse and wagon going west in the west-bound track. His attention was drawn to the men who had just passed in front of his car, and he saw them pause a moment and jump in a northwesterly direction to avoid being hit and the deceased was knocked down. The distance between the east-bound and west-bound tracks is about five feet, and there was room enough for a man to stand between a car moving one way and a wagon the other. If the men crossed in front of the street car before it started they were off the street crossing as far as the length of the team of ponies and the wagon which were in front of the car. If they did not come in front of the street car until after it had started and had moved over this distance up to the crossing, they were attempting to cross the street among the vehicles moving east and west, which had the right of way at that time, and went between two vehicles, where deceased could not well be seen and could not readily see approaching vehicles. He placed himself in a position where he could not look out for himself and emerged at a place where his presence could not be expected by the driver of a vehicle. The evidence fails to show that in attempting to cross the street at the time and place and in the manner he did the deceased was in the exercise of ordinary care for his own safety, and the instruction to find the defendant not guilty should have been given.

The judgments of the Appellate Court and the circuit court will be reversed and the cause will be remanded to the circuit court.

Reversed and remanded.

(No. 12676.—Judgment affirmed.)

THE PEOPLE *ex rel.* William W. Harding *et al.* Defendants
in Error, vs. J. E. WILEY *et al.* Plaintiffs in Error.

Opinion filed June 18, 1919—Rehearing denied October 10, 1919.

1. SCHOOLS—*high school district organized under void act of 1911 is neither a de jure nor de facto district.* The invalid Township High School act of 1911 conferred no right to organize a high school district, and any district attempted to be organized thereunder is neither a *de jure* nor a *de facto* district.

2. SAME—*when validating act of 1917 does not apply.* Where a judgment of ouster against the officers of a high school district organized under the void act of 1911 has become final by a failure to prosecute an appeal the validating act of 1917 cannot affect the judgment, and on a subsequent writ of error, which is the beginning of a new suit, the judgment of ouster must be affirmed.

3. CONSTITUTIONAL LAW—*legislature cannot exercise judicial power.* The General Assembly cannot review, reverse or set aside a judgment of a court, as the legislative power extends only to the making of laws, which is a determination as to what the law shall be and not a decision or determination as to what the law has been.

WRIT OF ERROR to the Circuit Court of Peoria county;
the Hon. JOHN M. NIEHAUS, Judge, presiding.

CAMERON & ANDERSON, for plaintiffs in error.

E. E. HARDING, (DAILEY, MILLER, McCORMICK & RADLEY, of counsel,) for defendants in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

By leave of court an information in the name of the People was filed on June 24, 1916, in the circuit court of Peoria county, to challenge the legal existence of Elmwood

High School District in the counties of Peoria and Knox, by calling upon the plaintiffs in error to show by what warrant they claimed to act as officers for such district. The plaintiffs in error filed pleas to the information, setting up by appropriate averments the organization of the high school district in compliance with the act of June 5, 1911, for the organization of high school districts and their election as officers of the district. A demurrer to the pleas having been sustained, amended pleas were filed on November 25, 1916, and on November 27, 1916, a demurrer to the amended pleas was sustained. The plaintiffs in error stood by their amended pleas and judgment of ouster was entered. From the judgment the plaintiffs in error prayed an appeal to this court, which was allowed upon their filing a bond. The bond was filed and approved on December 26, 1916, but the plaintiffs in error did not file a transcript of the record in this court within the time required by the statute. At the October term, 1918, the relators filed a transcript of the record and moved to dismiss the appeal, and the motion was allowed and the appeal dismissed. The plaintiffs in error have now sued out a writ of error to review the judgment of the circuit court, and assign as errors the sustaining of the demurrer and the judgment of ouster.

The act of June 5, 1911, violated constitutional provisions and was therefore void. (*People v. Weis*, 275 Ill. 581.) It conferred no right to organize a high school district and afforded no protection to the plaintiffs in error in assuming to act as officers of Elmwood High School District, which had been organized under the act. The school district was neither a district *de jure* nor *de facto*. (*People v. New York Central Railroad Co.* 283 Ill. 334.) The judgment of the court was therefore free from error and must be affirmed.

The assignment of errors also includes propositions that by the act of June 14, 1917, validating high school districts

organized under the act of 1911, the district was made a legal district and the orders of the court sustaining the demurrers and entering judgment became erroneous, and the district having become a legal one, the judgment should be reversed and the proceeding abated. In the constitutional division of the powers of government the legislative power is assigned to the General Assembly, and it is forbidden to exercise any other power. The exercise of judicial power being prohibited, the General Assembly cannot review, reverse, annul or set aside a judgment of a court. The legislative power extends only to the making of laws. It is a determination what the law shall be and not a decision or determination what the law has been. The court in this case correctly decided what the existing law was in relation to the organization of high school districts under the act of 1911, and whatever effect may be given to the validating act with reference to any high school district it cannot affect the judgment. That act was the determination by the General Assembly what the law should be in future cases falling under its provisions, and in various cases in which proceedings were still pending at the time the act went into effect it was applied as within the power of the General Assembly to prescribe what the law should be. (*People v. Madison*, 280 Ill. 96; *People v. Dix*, id. 158; *People v. Stitt*, id. 553; *People v. Wright*, 284 id. 339.) The judgment in this case became final by a failure to prosecute the appeal, and the writ of error was the beginning of a new suit. It does not come within any rule by which the validating act can be applied in a pending proceeding.

The judgment is affirmed.

Judgment affirmed.

Mr. JUSTICE STONE took no part in this decision.

(No. 12451.—Judgment affirmed.)

LYON & HEALY, Appellee, vs. THE PIANO, ORGAN AND MUSICAL INSTRUMENT WORKERS' INTERNATIONAL UNION *et al.* Appellants.

Opinion filed June 18, 1919—Rehearing denied October 24, 1919.

1. JURISDICTION—*jurisdiction is not lost by erroneous decision.* Jurisdiction is the power to hear and determine a matter in controversy between parties, and if the law gives a court power to render a judgment or decree the court has jurisdiction, and an erroneous decision cannot deprive it of that jurisdiction.

2. INJUNCTION—*when court has jurisdiction to issue an injunction.* Where a complainant asks that an injunction issue upon a bill stating a case belonging to a class within the general equity jurisdiction of the court and the court has before it the party against whom the injunction is asked, the court has jurisdiction to decide whether it will issue an injunction and the character of the same.

3. SAME—*circuit court has jurisdiction to issue injunction in a labor dispute.* The circuit court has jurisdiction of a bill for an injunction filed by an employer against a labor organization conducting a strike of his employees, and it may determine the character of the injunction which should issue.

4. CONTEMPT—*order of court having jurisdiction must be obeyed until set aside or reversed.* A party may refuse to obey an order of court where the court had no jurisdiction to make it but not on the ground that it was erroneously made, and an order made in the exercise of jurisdiction, though erroneous, must be obeyed until modified or set aside by the court making it or reversed by an appellate court.

5. SAME—*sufficiency of bill for injunction cannot be determined on hearing of a contempt charge.* On the hearing of a charge of contempt for violating an injunction which the court had jurisdiction to issue, whether the bill or affidavits showed a sufficient cause for granting the injunction is a question of no importance, and on appeal to the Supreme Court the questions of the sufficiency of the bill and the scope of the injunction issued are not open for determination unless brought up in a direct proceeding for review of the order granting the injunction.

FARMER and THOMPSON, JJ., dissenting.

CARTER and STONE, JJ., specially concurring.

APPEAL from the Circuit Court of Cook county; the Hon. FREDERICK A. SMITH, Judge, presiding.

FRED C. G. SCHMIDT, (W. B. RUBIN, and A. W. RICHTER, of counsel,) for appellants.

DUDLEY TAYLOR, for appellee.

Mr. CHIEF JUSTICE DUNN delivered the opinion of the court:

On November 5, 1917, Lyon & Healy, a corporation engaged in manufacturing and dealing in musical instruments and musical merchandise in the city of Chicago, filed its bill in the circuit court of Cook county and a temporary injunction was issued enjoining the defendants from, among other things, in any manner interfering with, hindering, obstructing or stopping the business of the complainant; from picketing or maintaining any pickets at or near the complainant's premises or along the routes followed by the complainant's employees in going to and from their homes and the complainant's place of business; from watching or spying upon the complainant's place of business, its employees or those who approach or leave its place of business or seek to enter its employment or to do business with it; from assaulting or intimidating, by threats or otherwise, its employees or any person who may become or seek to become its employee; from congregating about or near its place of business or any place where its employees are lodged or board, for the purpose of compelling, inducing or soliciting its employees to leave its service or to refuse to work for it, or for the purpose of preventing or attempting to prevent any person from freely entering into its service; from interfering with or attempting to hinder it from carrying on its business in the usual and ordinary way; from following its employees to their homes or other places or from calling upon them for the purpose or with the effect of inducing them to leave its employment or for the purpose

or with the effect of molesting or intimidating them or their families; from organizing or maintaining any boycott against it or its employees; from calling or procuring or attempting to procure strikes against it by unions other than the Piano, Organ and Musical Instrument Workers' International Union of America or by members of other unions, in furtherance of the conspiracy alleged in the bill upon which the injunction was based; and from doing anything to subject its employees, or any of them, to hatred, criticism, censure, scorn, disgrace or annoyance because of their employment by it.

The defendants to the bill were the Piano, Organ and Musical Instrument Workers' International Union of America, Charles Dold, its president, and a number of other persons, including all the appellants except George Atkins, and he, as well as all the other appellants, was served with the writ and had notice of the injunction on November 7, 1917. With the bill were filed a number of affidavits, from which it appeared that a strike occurred at the plant of Lyon & Healy on October 4, 1917; that the strikers instituted picketing, intercepting and following the employees of Lyon & Healy with demands that they quit their employment, assaulted them, called them offensive names and pursued a course of conduct toward them calculated to intimidate them and prevent them from continuing in their employment, maintaining a system of pickets, with headquarters in a saloon across from the plant, constantly watched the plant and those going to and from it and patrolled in front of or near it; that picketing incidental to strikes in Chicago has a well known reputation for such practices and methods as watching, following, intercepting and threatening employees and applicants for employment, calling them names, jeering, insulting and assaulting them and subjecting them to hostile annoyances, and that such practices were well understood by the employees of Lyon & Healy, so that they feared pickets and picketing, and the mere presence of such

pickets near its factory intimidated its employees and those seeking employment from it; that the picketing and interference were continuous, and the defendants had conspired and combined to injure the complainant by such means.

The defendants answered the bill on December 13, 1917, but continued to maintain their pickets, to patrol the front of the factory and to maintain a watch upon it. A bomb was exploded at night at Lyon & Healy's store, another at its garage, others at the homes of five of its employees, an employee was knocked down, kicked and severely injured within two blocks of the factory and several employees were taunted with the appellation of "scab." On December 15, 1917, Lyon & Healy filed its petition, charging six of the individual defendants, including Charles Dold, the president of the union, with violating the injunction, and asking for a rule on them to show cause why they should not be punished for contempt of court. The respondents answered the petition and denied that they had violated the injunction or had any knowledge of the assault and explosions set out in the petition, and alleged that the pickets were stationed for the sole purpose of informing appellee that there was a strike against it. The court found the respondents guilty of contempt for violating the injunction. Dold was sentenced to imprisonment in the county jail for thirty days and to pay a fine of \$500 and the other defendants were fined \$300 each. All of the respondents have appealed.

The only question to be considered is whether the circuit court had jurisdiction to grant the injunction. Counsel for appellants do not contend that they did not picket the appellee's plant or did not violate the injunction, but only that there is no evidence that they were guilty of any threats, intimidations or acts of violence or have attempted to create or enforce a boycott, and therefore it is argued that they have not violated any prohibition of the injunction which the court had power to grant.

The injunction prohibited the picketing or the maintaining of any picket or pickets at or near the appellee's premises, and the appellants' contention is that picketing is the exercise of a legal right, which can only be enjoined when something else beside the act of picketing itself is done. Their counsel state that, "of course, where, under the guise of picketing, large crowds are gathered and violence results, or employees are intimidated or coerced to desist from work, the acts become illegal. The injunction, however, to remain within the bounds of the law, should enjoin only the illegal acts or the excess which makes the illegality, and when it seeks to enjoin the legal act it is a misuse of the power of the court. In order that the picketing may be effective it is necessary for the union to have a sufficient number of men so as to be reasonably able to reach the employees, and those intending to become employees, at the particular place of the strike. If the weapon of the court is used for the purpose of so restricting the laboring men that the exercise of their perfectly legal right to use certain means for the economic advancement becomes useless then the court has abused its function." This statement concedes that picketing may be enjoined under certain circumstances. In *Barnes & Co. v. Chicago Typographical Union*, 232 Ill. 424, a decree of injunction in substantially the language of the decree herein was affirmed. No one denies that the courts have the power to interfere by injunction in controversies between employer and employee in proper cases, at the suit of either party. So the appellants' counsel state that the court had the undoubted right to prohibit violence, assault and breach of the peace upon the workingmen employed in complainant's shop during the strike but did not have the right to prohibit the peaceful assembly of working men who are on a strike; that this part of the injunction, therefore, was illegal and should not have been included in the writ. Granting this to be true, it does not follow that the court had no jurisdiction to

- grant the injunction. Jurisdiction is the power to hear and determine the matter in controversy between parties, and if the law gives the court power to render a judgment or decree then the court has jurisdiction. Jurisdiction does not depend upon the correctness of the decision and is not lost by an erroneous decision. Where a court has before it a party complainant asking that an injunction issue on a bill stating a case belonging to a class within the general equity jurisdiction of the court, and also the party against whom the injunction is asked, the court has jurisdiction to decide whether an injunction ought to issue and the character of the injunction, and should the court err in ordering an injunction to issue when one ought not to issue or in ordering an injunction broader in its terms than is justified by the bill its decree will be reversed, but the error will be no defense to an attachment for contempt for violating the injunction. The error does not deprive the court of its jurisdiction and the decree is binding upon the defendant until vacated or set aside. (*Franklin Union v. People*, 220 Ill. 355.) A party may refuse to obey an order where the court had no jurisdiction to make it, but not on the ground that it was erroneously made. An order made in the exercise of jurisdiction, though erroneous, must be obeyed until modified or set aside by the court making it or reversed by an appellate court. (*Court Rose Foresters of America v. Corna*, 279 Ill. 605; *Christian Hospital v. People*, 223 id. 244.) There can be no doubt that the circuit court of Cook county had jurisdiction of the subject matter and the parties. It had jurisdiction to determine whether the bill was sufficient to justify the issue of an injunction and the character of the injunction which should issue. Whether the bill stated a cause of action for which an injunction should be granted, or whether the affidavits sufficiently establish the facts upon which an injunction should be granted, are questions of no importance upon the hearing of a charge of contempt for violating the injunction which

the court ordered. If the bill was insufficient it should have been tested by a demurrer and not by disobedience of the writ. (*Court Rose Foresters of America v. Corna, supra.*) If its averments were not true a motion should have been made to dissolve the injunction, but until it was dissolved the appellants were bound to obey it. The sufficiency of the bill is not before us for determination. Neither is the question whether the scope of the injunction is broader than the allegations of the bill. Those questions can arise only on a direct proceeding for the review of the order granting the injunction.

The appellants having violated the injunction were properly adjudged guilty of contempt of court, and the judgment against them is affirmed.

Judgment affirmed.

FARMER and THOMPSON, JJ., dissenting.

CARTER and STONE, JJ., specially concurring:

Under repeated decisions of this court on similar, if not identical, questions raised here, we think the judgment of the lower court on this, a collateral attack, must be affirmed. We reach this conclusion with reluctance, because we are firmly convinced that the injunction order entered was entirely too sweeping in its provisions, particularly the provision enjoining the appellants, or those associating with them, from interfering or attempting to hinder the appellee from carrying on its business in the usual and ordinary way. It is difficult to conceive of a strike without some damage occurring to the parties in the dispute. Even if the strikers commit no physical violence, the striking employees always plan and intend to deprive the employers of their labor, and in so doing they necessarily unsettle the work of the employers, and, in most instances, in so doing thereby cause damage. This court has said in *Illinois Malleable Iron Co. v. Michalek*, 279 Ill. 221, that it must be conceded, in a strict sense, any action taken by the strikers whatever, such as merely passively staying away from

their employment, would to some extent be an injury to the employer. Courts cannot by writ of injunction prevent employees from striking. *Kemp v. Division* 241, 255 Ill. 213.

Had there been a direct appeal from the decretal order restraining the appellants from interfering or attempting to hinder appellee from carrying on its business in the usual and ordinary way, without question this court would be compelled to modify such restraining order. Furthermore, we are disposed to think that the restraining order is too broad in its phraseology in reference to picketing appellee's place of business, but in view of our conclusion that these questions were not raised in a direct proceeding and can not be raised in a collateral attack on a decretal order we do not deem it necessary to discuss this question at length.

We cannot agree with the argument of counsel that because the restraining injunctive order is too broad it furnishes an excuse for violating any part of the injunction. Where an injunctive order is absolutely void for want of power in the court, a party may refuse to obey it on the ground that it was improperly and erroneously made. The superior court of Cook county has the power, under the statute, to grant writs of injunction, and the power to grant the writ in this particular case was conferred by the filing of the bill. It has long been the settled rule of law in this court that appellants cannot attack collaterally any portion of this restraining order because it contained erroneous provisions such as those here referred to. *Barnes & Co. v. Typographical Union*, 232 Ill. 402; *Clark v. Burke*, 163 id. 334; *Christian Hospital v. People*, 223 id. 244; *Loven v. People*, 158 id. 159; *Leopold v. People*, 140 id. 552.

(No. 12651.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. JOHN C. MEYER, Plaintiff in Error.

Opinion filed June 18, 1919—Rehearing denied October 24, 1919.

1. CRIMINAL LAW—*forgery is committed by making false instrument with the intent to defraud.* The crime of forgery is complete with the making of a false instrument with the intent to defraud, and it is immaterial whether anyone is, in fact, defrauded if the intent to defraud is shown.

2. SAME—*the intent to defraud may be presumed from circumstances proven.* Where a forged instrument is uttered the intent to defraud may be presumed or inferred from proven facts and circumstances surrounding the transaction.

3. SAME—*entries by agent in his books are not admissible in his defense against charge of forgery.* Entries by an agent in his books are not admissible in his behalf in defense against the charge of forging the name of his employer, as such entries are in the nature of self-serving declarations.

4. SAME—*what not a defense to the charge of forging name of the defendant's employer.* Where an agent is charged with having forged the name of his employer, it is no defense that the employer, who finally paid the forged instrument, was indebted to the defendant and that the defendant intended to devote the money obtained by means of the instrument to the payment of the debt or that the bank which advanced the money on the instrument was reimbursed.

5. SAME—*when instruction does not assume that defendant was contradicted.* An instruction that the jury "are also to take into consideration the fact, if such is the fact, that he [the defendant] has been contradicted by other credible witnesses" does not assume that the defendant has been contradicted, nor does it tell the jury to disbelieve his testimony if he has been contradicted.

6. SAME—*defendant cannot complain that instruction does not define word "forge."* In a prosecution for forgery the defendant cannot complain that an instruction given for the People uses the word "forge" without defining it, particularly where he requested no instruction defining the same.

WRIT OF ERROR to the Circuit Court of Ford county;
the Hon. T. M. HARRIS, Judge, presiding.

SCHNEIDER & SCHNEIDER, for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, F. M. THOMPSON, State's Attorney, and SUMNER S. ANDERSON, for the People.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

Plaintiff in error, John C. Meyer, (hereinafter referred to as defendant,) was convicted in the circuit court of Ford county of the crime of forgery. Motions for a new trial and in arrest of judgment were made and overruled and defendant was sentenced to the penitentiary.

Defendant conducted the only store at Garber, a grain station in Ford county, and also acted as agent for the American Hominy Company, a New Jersey corporation doing business in this State under the trade name of Suffern-Hunt Mills, with offices at Decatur, Illinois, and hereinafter referred to as employer. As such agent he was authorized to purchase grain and draw sight drafts on his employer in payment of such purchases. He was required to report daily to his employer at Decatur, on report sheets furnished to him by his employer, all purchases made by him. These sheets were designed to show quantity and kinds of grains received, price the bushel, the number and the amount of the sight draft given in payment, total grains of each kind received, shipped out and remaining in elevator, whether cash purchase or under contract, and other details unimportant here. On April 21, 1917, defendant in his daily report reported to his employer that he had contracted to purchase from W. E. Lipe, a farmer living west of Garber, 1800 bushels of white corn at \$1.45 a bushel. In his daily report of June 7, 1917, defendant reported that Lipe had delivered on contract 1612.8 bushels of white corn at \$1.45 a bushel, and that he had issued to Lipe draft No. 2908 in the sum of \$2337.60. Defendant, in fact, had not con-

tracted for nor did he purchase any corn from Lipe, as reported by him to his employer. Defendant drew a sight draft on his employer in favor of Lipe for \$2337.60, and thereupon indorsed Lipe's name upon the back of the sight draft and then deposited the sight draft in the Gibson City State Bank to his (defendant's) credit. It was paid by the American Hominy Company June 8, 1917. The proceeds of this check were all drawn out of the Gibson City State Bank by defendant by various individual checks issued by him. After depositing this sight draft defendant made purchases of grain from various farmers and issued his individual checks therefor, amounting to the sum of \$1600. He claims this grain was put in the elevator to his employer's credit. The evidence is not clear as to what became of the difference between the amount of the sight draft and the amount paid out by defendant by means of these individual checks. He claims it was used to reimburse him for grain for which he had furnished farmers implements and groceries. There is also evidence showing that defendant bought grain on his own account and shipped it through his employer's elevator without his employer's knowledge. The bank gave defendant credit to the full amount of the sight draft, assuming that the signature of Lipe was genuine. Lipe knew nothing of the transaction whatever, and neither did defendant's employer, except such information as it received through defendant's false report.

Counsel for defendant take the position in their brief that defendant did not defraud either Lipe or the Gibson City State Bank. The crime of forgery is complete with the making of a false instrument, the subject of forgery, with the intent to defraud, and it is immaterial whether anyone was, in fact, defrauded. (19 Cyc. 1377.) If the intent to defraud is shown, that is sufficient. When the forged instrument is uttered the intent to defraud is presumed. (*Spears v. People*, 220 Ill. 72.) Where the party is actually defrauded the intent to defraud ordinarily be-

comes conclusive. Here the bank paid out its money on the forged instrument, and the fact that it was reimbursed is no defense to a charge of forgery. The intent to defraud may be inferred from facts and circumstances surrounding the transaction, and from an examination of the record in this case we feel that the intent to defraud was fully shown. The evidence warrants the conclusion that the defendant used the sight draft as the means of obtaining money for his own use.

It is next urged that the court erred in refusing to admit in evidence defendant's books showing certain business transactions with John Claussen. It is contended that the account book offered in evidence would show disbursements for the benefit of his employer to the amount of the difference between the amount of the sight draft and the individual checks issued by defendant to various farmers from whom he had purchased grain. We fail to see how this evidence was competent in defendant's behalf. The entries being made by defendant, they come under that class of evidence known as self-serving declarations, and they were properly excluded by the trial court. Furthermore, it could not have served as a defense to forging Lipe's name. It would be no defense that the employer, who finally paid this forged instrument, was indebted to defendant and that defendant intended to devote the money obtained by means of the instrument to the payment of the debt. (19 Cyc. 1377.)

It is also urged that the court erred in admitting evidence of a shortage of grain in the elevator, as shown in rebuttal by a witness for the People. This evidence was properly admissible, as it tended to rebut defendant's testimony that he purchased grain with the money received on this draft and placed it in the elevator for his employer.

Defendant further urges as ground for reversal that the trial court erred in the giving of instructions offered by the People. People's instructions 1 and 2 defined reasonable doubt and have been repeatedly given in the trial of

criminal cases and have received the approval of this court. (*Painter v. People*, 147 Ill. 444.) No. 4 was an approved instruction on presumption of innocence. *Spies v. People*, 122 Ill. 1.

Instructions 3, 6 and 10 are complained of on the ground that they are instructions on circumstantial evidence and not applicable to this case. Part of the People's case was necessarily based upon circumstantial evidence, and these instructions were properly given. The intent is generally determined from the facts and circumstances surrounding the transaction.

Instruction No. 5 was an approved instruction on the weight which should be accorded the defendant's testimony. Complaint is made of the mandatory character of the word "are" in the following sentence: "And you are also to take into consideration the fact, if such is the fact, that he has been contradicted by other credible witnesses." This instruction does not assume a fact and then direct the jury to consider it. It simply states that if the defendant has been contradicted by other credible witnesses the jury should consider this in weighing defendant's testimony. It does not assume that defendant has been contradicted, nor does it tell the jury that they should disbelieve his testimony if he has been contradicted. The instruction correctly stated the law and was properly given. *Hirschman v. People*, 101 Ill. 568; *People v. Snyder*, 279 id. 435.

Complaint is made that People's instructions 8, 9, 11, 12 and 13 are objectionable for the reason that they do not define the meaning of the term "forge," and that neither of the instructions states what constitutes the crime of forgery. The term "forge" was used in the instructions in the same sense in which it is used in the statute and could not have been misleading to the jury. These instructions might properly have contained a definition of the term "forgery," but had defendant requested the trial court to so instruct

the jury he could have obtained the benefit thereof. Failing to do so he cannot be now heard to complain. We have considered other objections made to these instructions and find that they correctly state the law when considered with other given instructions. It was clearly pointed out in instructions given for the defense that the intent to defraud must be proven.

Complaint is also made of the action of the trial court in refusing certain instructions asked for by the defendant. Defendant's refused instructions 1 to 7, inclusive, were on the subject of reasonable doubt and presumption of innocence and were fully covered by other instructions given. Defendant's refused instructions 8 and 14 were peremptory instructions and were properly refused by the trial court, as there was evidence tending to show that at the time defendant prepared the draft and signed Lipe's name on the back thereof he intended to defraud either his employer, the bank or Lipe. It was properly left to the jury to determine whom he intended to defraud. Counsel for defendant argue at great length on the action of the trial court in refusing instruction No. 13. This instruction was properly refused for the reason that there was no evidence upon which to predicate the same.

We have given careful consideration to the instructions in this case, and when the same are read as a series they fairly present the law applicable to the case.

The verdict of guilty was amply justified by the competent evidence. Defendant has had a fair and impartial trial, and no prejudicial error having intervened in the proceedings the judgment of the trial court is hereby affirmed.

Judgment affirmed.

(No. 12688.—Reversed and remanded.)

ANNA A. WOLF, Appellant, vs. M. BEATRICE SCHWILL
et al. Appellees.

Opinion filed June 18, 1919—Rehearing denied October 10, 1919.

1. **CONTRACTS**—*contracts will be construed, if possible, so as to give effect to the intention.* In construing a written contract it is proper, when the writing is not specific, to ascertain the circumstances surrounding the parties and the object they had in view, and effect will be given to the real intention whenever it can be done without violence to the plain meaning of the language used.

2. **BUILDING LINES**—*restriction will be enforced if the intent is clearly manifested.* In the interpretation of contracts imposing limitations and restrictions upon the use of property doubts are to be resolved against the limitation or restriction, but where the intent is clearly manifested by the language of the contract in view of the situation and circumstances, the restriction is uniformly enforced so as to carry out what the parties meant.

3. **SAME**—*erection of a fence defeating purpose of building line restriction not permitted.* The purpose of a building line restriction is to create an easement for unobstructed air, light and vision for the benefit of the owners of the property, and a party to the agreement will not be allowed to erect a fence of such proportions as defeats the manifest purpose of the restriction, although fences are in terms excepted therefrom.

THOMPSON, J., dissenting.

APPEAL from the Circuit Court of Cook county; the
Hon. CHARLES M. WALKER, Judge, presiding.

SCOTT, BANCROFT, MARTIN & STEPHENS, (JOHN E.
MACLEISH, of counsel,) for appellant.

STEIN, MAYER & DAVID, (ELIAS MAYER, and SIGMUND
W. DAVID, of counsel,) for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the
court:

By the decision in *Wolf v. Schwill*, 282 Ill. 189, this
court affirmed a decree of the circuit court of Cook county
enjoining the appellees, M. Beatrice Schwill and Julius

Schwill, her husband, from maintaining a wall erected on the north eighteen feet of the ground between their residence and that of the appellant, Anna A. Wolf, in violation of a building line restriction to which all the grounds were subject and requiring appellees to remove the same. The appellees complied with the decree by removing the brick wall but substituted a wooden structure consisting of eight box columns seven feet three inches high from the sidewalk line, with palings between, close together, six inches wide and six feet and three inches high from said sidewalk line. The columns at the base are about two feet square, the body twenty-one inches square and the cap twenty-four inches. For twenty-three inches above the sidewalk there is no opening. Above that there is a one and one-half inch opening part way to the top and the rest of the way there is one-half inch opening. Near the top there are round holes two inches across, and the edges of the palings are beveled where there are openings and the tops are beveled off. The appellant filed a supplemental bill to enjoin the appellees from maintaining this structure and to compel its removal. Upon a hearing the bill was dismissed for want of equity, and an appeal was allowed and perfected.

The building line restriction was quoted in *Wolf v. Schwill*, *supra*, and prohibits a building or structure of any kind within eighteen feet of the north line of the premises, except only bay windows, verandas, porches, fences or similar structures, and the present dispute is whether the wooden structure is within the terms of the restriction. It is not quite as high as the brick wall but accomplishes practically the same purpose. The record contains photographs offered in evidence by the respective parties illustrating the possibilities of the photographic art, one set representing a structure in great magnitude and towering proportions and the other a diminutive object, but there is no controversy as to the character or dimensions as given above. The argument for the appellees is that the structure is a fence and

therefore permitted by the covenant; that being a foot lower than the brick wall it does not cut off appellant's view as much as the wall did, and that appellant has not really been injured, because, while she before had an unobstructed view of the street and cannot see as much of it as she could before, her view then was across a barren spot of ground and now she can look into the Italian sunken garden, which must give her esthetic pleasure. Counsel are correct in saying that the wooden structure replacing the brick one is within the meaning of the word "fence," and so is a palisade or similar structure for the protection of an enclosure like a paddock or an amusement park, fair ground or similar place for public entertainment to which an admission fee is charged and where the object of the structure is to exclude the public generally and admit only those who pay the required admission fee. The covenant is to be interpreted, if possible, so as to carry out what the parties meant, and whether that kind of a fence was intended is to be determined by settled rules of law for the construction of contracts. In arriving at the intention of the parties where the language of a contract is susceptible of more than one construction, as in this case, it is to be construed in the light of the circumstances surrounding the parties, the nature and situation of the subject matter and the apparent purpose of making the contract. In giving an interpretation to a written contract it is always proper, when the writing is not specific, to ascertain the circumstances surrounding the parties and the object they had in view to ascertain the true meaning, and effect will be given to the intention wherever it can be done without doing violence to the plain and obvious meaning of the language employed. *Eldridge v. Rowe*, 2 Gilm. 91; *Tracy v. City of Chicago*, 24 Ill. 500; *Robinson v. Stow*, 39 id. 568; *Thomas v. Wiggers*, 41 id. 470; *Hayes v. O'Brien*, 149 id. 403; *Matthews v. Kerfoot*, 167 id. 313; *Carroll v. Drury*, 170 id. 571; *Brandenburg v.*

Lager, 272 id. 622; 2 Parsons on Contracts, 499; Bishop on Contracts, sec. 380; 6 R. C. L. 836; 13 Corpus Juris, 542.

In the interpretation of contracts imposing limitations and restrictions upon the use of the property doubts are to be resolved against the limitation or restriction, but where the intent is clearly manifested by the language of the contract in view of the situation and circumstances, the restriction is uniformly enforced. *Hutchinson v. Ulrich*, 145 Ill. 336; *Ewertsen v. Gerstenberg*, 186 id. 344; *Cochran v. Bailey*, 271 id. 145; *Voorhees v. Blum*, 274 id. 319.

The purpose of a building line restriction is to create an easement for unobstructed air, light and vision for the benefit of the owners of the property, and the property concerning which the restriction was made in this case is high-class residence property, which is improved with ornate and expensive residences. It is clear that the exception as to the erection of a fence or similar structure was intended to apply to fences of the character ordinarily in use and common to city property similarly situated, which would not materially frustrate the intention of the parties. It is beyond question that the parties to the restriction never thought of permitting such a thing as the structure erected by the appellees, interfering with a practically unobstructed view of the street. The purpose of the contract would be defeated if the appellees should be permitted to erect such a structure within the restricted area as that which has been erected in this case, which has practically the same effect as the brick wall. Whether Mrs. Wolf is compensated by the privilege of looking into a beautiful and artistic garden is immaterial, since she prefers to enforce her right under the covenant.

The decree is reversed and the cause remanded to the circuit court, with directions to grant the relief prayed for in the supplemental bill.

Reversed and remanded, with directions.

Mr. JUSTICE THOMPSON, dissenting.

(No. 12682.—Reversed and remanded.)

THE LASALLE OPERA HOUSE COMPANY, Appellee, *vs.* THE
LASALLE AMUSEMENT COMPANY, Appellant.

Opinion filed June 18, 1919—Rehearing denied October 27, 1919.

1. DEBTOR AND CREDITOR—*Bulk Sales act applies to sale of property used in theatre business.* The Bulk Sales act applies to a sale by an opera house company of its lease, furniture, fixtures, equipment and the good will of the theatrical business, as the act applies to any sale in bulk of the major part or all of the goods and chattels of the vendor's business otherwise than in the ordinary course of trade. (*Weskalnies v. Hesterman*, 288 Ill. 199, followed.)

2. GARNISHMENT—*statutory conditions to issuance of garnishment process are essential to jurisdiction.* A garnishment proceeding is a statutory mode of obtaining execution after the means known to the common law have been employed and have failed, and to give the court jurisdiction the conditions enumerated in section 1 of the Garnishment act for the issuance of process must be shown to have been complied with.

3. SAME—*affidavit that execution was issued and returned "no property found" is not evidence of the fact.* The Garnishment act requires that an execution shall have been actually issued and returned, but the statement in the affidavit for the issuance of the garnishment process that the execution was issued and returned "no property found" is not evidence of that fact.

4. SAME—*garnishee may question jurisdiction of court in original proceeding.* All portions of the record in the original proceeding having a bearing on the question of the jurisdiction of the court in rendering a judgment therein are part of the record in a garnishment proceeding, and the garnishee may inquire into the validity of the proceedings by which the court acquired jurisdiction of the judgment debtor.

5. SAME—*to sustain judgment against garnishee, issue and return of execution must be shown.* The issue and the return of the execution are not part of the common law record in the original proceeding, but they, together with the affidavit for the summons against the garnishee, are the means of acquiring jurisdiction in a garnishment proceeding, and are therefore a part of the record which must be shown, on appeal, to sustain a judgment against the garnishee.

6. SAME—*when garnishee may be subrogated to rights of lienholders.* Under section 24 of the Garnishment act the court exercises an equitable jurisdiction in a garnishment proceeding, and

where a party has, without actual fraud, purchased the property of a vendor, who applies the purchase money in the satisfaction of debts which were liens upon such property, the purchaser may be subrogated to the rights of the lienholders when a judgment creditor of the vendor seeks to garnishee the property.

7. **BILLS OF EXCEPTIONS**—*when nunc pro tunc order for filing bill is proper.* If a bill of exceptions is presented to the judge within the time fixed by the order of court for filing the same, the judge may sign the bill after the expiration of such time and order the bill filed *nunc pro tunc* as of the date of presentation.

APPEAL from the Second Branch Appellate Court for the First District;—heard in that court on appeal from the Municipal Court of Chicago; the Hon. JOHN RICHARDSON, Judge, presiding.

WICKETT, WALKER & WEGG, (SILBER, ISAACS, SILBER & WOLEY, and C. J. SILBER, of counsel,) for appellant.

ADOLPH MARKS, for appellee.

Mr. CHIEF JUSTICE DUNN delivered the opinion of the court:

The Goes Lithographing Company recovered a judgment on June 4, 1916, in the municipal court of Chicago, against the LaSalle Opera House Company for \$1348.18 and costs, and on March 6, 1917, filed with the clerk of that court the affidavit required by section 1 of the Garnishment act, whereupon a garnishee summons was issued and served on the LaSalle Amusement Company. The garnishee answered, denying any indebtedness to the judgment debtor or the possession of any property belonging to it, and the judgment creditor took issue on the answer. The cause was heard by the court without a jury, and at the close of the evidence the garnishee moved that it be discharged, but the court overruled the motion and rendered judgment against the garnishee, for the use of the judgment debtor, for the amount of its judgment. The Appel-

late Court, having affirmed the judgment, granted a certificate of importance, and the garnishee has appealed.

The LaSalle Opera House Company was engaged in conducting a theater in property for which it held a lease. In 1913 it issued \$40,000 of bonds, upon which it defaulted in 1914. Besides the bonds it owed other debts which were a lien upon its property. On June 9, 1914, the LaSalle Opera House Company sold its lease and all its furniture, fixtures, equipment and tangible property, together with the good will of the theatrical business, its trade-mark and trade names, and all other property which it owned, to the LaSalle Amusement Company for the consideration of \$50,000, which was paid to it by the purchaser. The Goes Lithographing Company was at the time a creditor of the LaSalle Opera House Company and no notice was given to it of the sale. The LaSalle Opera House Company had no other assets. It paid its bonds with the purchase money received and applied the residue of the purchase price to the payment of other debts which were liens upon the property.

The principal question is whether the Bulk Sales act, which was passed in 1913, (Laws of 1913, p. 258,) applies to this sale, and the appellant argues that the personal property employed by a non-trading or non-mercantile corporation which is not the subject of purchase and sale in the ordinary course of its business is not governed, as to the transfer thereof, by the requirements of the Bulk Sales act. We had this question under consideration at the last term in the case of *Weskalmies v. Hesterman*, 288 Ill. 199, where it was claimed that the sale by a farmer and dairyman of all the live stock, agricultural implements and farm machinery used on his farm was not subject to the provisions of the Bulk Sales act; that the act did not apply to farmers but only to those engaged in selling merchandise, commodities and other wares. The conclusion reached was that the act applied to any sale in bulk of the major part or all of the goods and chattels of the vendor's business

otherwise than in the ordinary course of trade and in the regular and usual prosecution of the vendor's business.

The appellant insists that the judgment should be reversed because the record does not show an execution was issued on the judgment against the LaSalle Opera House Company and returned "no property found" before the issue of the garnishee summons, as required by section 1 of the Garnishment act. The record of a judgment, the issue of an execution, its return "no property found," and the affidavit of the plaintiff or other credible person that the defendant has no property, within the knowledge of the affiant, in his possession liable to execution, and that the affiant has just reason to believe that any other person is indebted to the defendant or has effects or estate of the defendant in his possession, custody or charge, are conditions precedent to the issuance of a garnishee summons. These acts are indispensable to maintain the proceeding, which is a statutory mode of obtaining execution after the means known to the common law have been employed and failed, and can only be resorted to after the requirements of the statute have been complied with as conditions to issuing the process. (*Michigan Central Railroad Co. v. Keohane*, 31 Ill. 144.) In the absence of any one of the required conditions the court has no jurisdiction of the proceeding.

The appellee meets this objection by referring to the affidavit for the summons against the garnishee and the fact that the bill of exceptions does not contain all the evidence, and argues that therefore the presumption is that there was sufficient evidence to warrant the court in finding the issue and return of the execution. The affidavit does state that an execution was issued and returned "no property found," but this is not evidence of the fact. The statute does not require an affidavit in regard to the issue and return of the execution but does require that the execution shall have been actually issued and returned, and it has not made the affidavit evidence of that fact. The question of the issue

and return of the execution was not material to the trial of the issue as to the truth of the discovery made by the garnishee, and therefore no evidence on that question could have been introduced on the trial of that issue or would have had a proper place in the bill of exceptions. Garnishment is a statutory proceeding, in which no presumption of jurisdiction is indulged but a compliance with the statutory requirements must appear. The proceeding being a means of procuring satisfaction of the original judgment, the garnishee may inquire into the validity of the proceedings by which the court acquired jurisdiction of the judgment debtor. (*Kirk v. Dearth Agency*, 171 Ill. 207.) All portions of the record in the original proceeding having a bearing on the question of the jurisdiction of the court in rendering a judgment are part of the record in the garnishee proceedings. (*Dennison v. Taylor*, 142 Ill. 45.) The execution issued and its return are not part of the common law record in the original proceeding, but they, together with the affidavit for the summons against the garnishee, are the means of acquiring jurisdiction in the garnishee proceedings, and are therefore a part of the record which must be shown to sustain a judgment against the garnishee. The absence of them from the record is fatal to the judgment.

The appellant contends that the property sold was subject to liens to its full value, which were paid by the vendor out of the purchase money; that there was therefore nothing of value which the creditor could have reached, and that the liens should not be regarded as extinguished by their payment without the right of the appellant to subrogation. It claims the benefit of the equitable principle that when a conveyance of property has been avoided by creditors of a grantor it may be upheld in favor of a grantee who is free from actual fraud to the extent of the actual consideration, and he may be subrogated to the rights of the holders of liens whose incumbrances he has paid. (*Phelps v. Curts*, 80 Ill. 109; *Lobstein v. Lehn*, 120 id. 549; *Lewis v. Wil-*

kinson, 113 N. Y. 485; *Adams v. Young*, 200 Mass. 588.) In the last case cited this rule was applied to a sale made in violation of the Bulk Sales act of Massachusetts, and it was said that the merely constructive fraud of a purchaser would not prevent him from being protected in this manner if he had not himself actually participated in the fraud. It was held that the defendants had the right to rely upon a mortgage of which they had taken an assignment, and it was further said: "If it were necessary to pass upon that question it would not be easy to avoid saying that they could rest also upon the mortgage which was paid and discharged. It was their money that paid the mortgage debts. The fact that the money passed through the hands of the mortgagors and the form of the transfer which the defendants took can not overcome the real effect of the transaction." That case was a suit in equity while this is a proceeding in garnishment, but under section 24 of the Garnishment act, which gives the court power to make all orders in regard to property under the control of the garnishee which may be necessary or equitable between the parties, the court exercises an equitable jurisdiction.

The appellee insists that the appellant cannot now have the advantage of this rule because it stipulated in the municipal court that if the court found in favor of the appellee it might render a judgment against the appellant for the amount of the appellee's judgment claim instead of entering judgment for the delivery of the property itself, and consequently it cannot now raise the point that the property purchased was not of sufficient value to satisfy the judgment claim. There is no estoppel of the appellant by reason of this stipulation. The object of the stipulation was merely to authorize a judgment for the value of the property for the amount of the judgment instead of the delivery of the property itself, and is based on the hypothesis that the court finds in favor of the appellee. The appellant did not agree that judgment might be entered against it ab-

solutely or at all, but its stipulation was that if the court found in favor of the appellee and did render judgment against it, the judgment which should be rendered should be a judgment for money instead of for the delivery of the property.

The appellant was allowed sixty days from June 23, 1917, to file a bill of exceptions. The bill was presented to the judge on August 20 for signature and he signed it on September 29 *nunc pro tunc* as of August 20. An order of court was entered on September 29 for filing the bill on that date as of August 20, and it was so filed. This was in conformity with the proper practice, and the bill of exceptions thereby became a part of the record. *Hall v. Royal Neighbors*, 231 Ill. 185; *Hill Co. v. United States Guaranty Co.* 250 id. 242; *City of Lake Forest v. Buckley*, 276 id. 38; *City of East St. Louis v. Vogel*, id. 490.

The judgments of the Appellate Court and the municipal court are reversed and the cause is remanded to the municipal court.

Reversed and remanded.

(No. 12612.—Reversed and remanded.)

ALVIN R. CUTLER *et al.* Appellees, *vs.* KATE GARBER *et al.*
Appellants.

Opinion filed June 18, 1919—Rehearing denied October 27, 1919.

1. DEEDS—*statutory form of warranty deed conveys fee simple.* A statutory form of warranty deed, under sections 9 and 13 of the Conveyance act, conveys a fee simple title unless the estate is limited by the language of the deed itself.

2. SAME—*remainder cannot take effect in abridgment of particular precedent estate.* An estate in remainder is limited to take effect upon the termination of a particular precedent estate and not in abridgment of it.

3. SAME—*when estate subject to conditional limitations is not a life estate with remainders.* Where the estate conveyed by statutory warranty deed is subject to three conditional limitations, based

upon the death of the grantee leaving no widow or children, or leaving a widow and no children or leaving both widow and children, but omits to provide for the contingency of his leaving children but no widow, the estate granted is not merely a life estate but may continue indefinitely in the grantee and his heirs; and the future interests are not remainders but executory limitations, as they must take effect, if at all, in derogation of the estate created by the granting clause. (*Buck v. Garber*, 261 Ill. 378, criticised.)

4. SAME—*when rule that a gift over will not take effect unless contingency happens during preceding estate does not apply.* The rule that where an estate is limited after a particular estate, with a gift over upon the happening of an uncertain event, the gift over will take effect only upon the happening of the contingency during the particular estate, does not apply where the instrument creating the limitations shows an intention to refer the contingency to a later date than the termination of the particular estate. (*Lachenmeyer v. Gehlbach*, 266 Ill. 11, distinguished.)

5. SAME—*meaning of deed is determined by facts existing at time of delivery.* The meaning of a deed must be determined by the application of its language to the facts existing at the time the deed was delivered.

APPEAL from the Circuit Court of Shelby county; the Hon. WILLIAM B. WRIGHT, Judge, presiding.

J. H. FORNOFF, for appellants.

T. W. HOOPES, and J. W. TEMPLEMAN, for appellees.

Mr. CHIEF JUSTICE DUNN delivered the opinion of the court:

This is an appeal by the wife and children of Henry Garber from a decree of the circuit court of Shelby county for the partition of the eighty acres of land involved in the case of *Buck v. Garber*, 261 Ill. 378, finding that the appellants have no interest in the land.

Frederick Buck being the owner of the land, on August 15, 1888, conveyed it to Henry Garber by an ordinary statutory warranty deed containing, immediately after the description of the premises, the following language: "Said grantors to have and to hold possession and use of said land

during their natural lives and at their death the said Henry Garber to inherit and to have full possession. If the said Henry Garber dies and leaves no wife or children, the land hereby conveyed shall descend to the legal heirs of Frederick Buck. If said Henry Garber dies leaving a wife and no children, one-half of said land shall descend to his lawful wife and the other half to the lawful heirs of Frederick Buck. If said Henry Garber dies leaving a wife and child or children, said wife and children shall inherit the whole land as the law directs." Several years afterward Garber re-conveyed the premises to Buck by a quit-claim deed. In 1910 Buck began a suit in equity against Garber and his wife and children, averring that his deed to Garber was without consideration and had never been delivered, and that all of the language which has been quoted, following the words, "said grantors to have and to hold possession and use of said land during their natural lives," was inserted by mistake and without his knowledge. The bill prayed for the removal of the cloud upon the complainant's title. The decree of the circuit court which granted the relief prayed for was reversed at the February term, 1914, and the cause was remanded, with directions to dismiss the bill. (*Buck v. Garber, supra.*) On March 7, 1917, Buck died, leaving Emma Buck, his widow, (to whom by his will he gave all his property,) and his daughter, Luella Cutler, his only heir. After the probate of the will, Emma Buck, the widow and devisee, and Luella Cutler, the heir, conveyed the premises to Alvin R. Cutler, Luella's husband, by quit-claim deed, reciting, "the intent and purpose of this deed is to convey the absolute fee simple to said lands to the grantee and destroy any contingent remainders created by deeds executed by Frederick Buck, deceased, if such contingent remainders still exist." Thereupon Cutler conveyed the premises by quit-claim deed to his wife, Luella; they, joined in a quit-claim deed of a life estate to Mrs. Buck; Mrs. Cutler conveyed an undivided half to her husband, and

they jointly filed the bill for partition against Mrs. Garber and her children. The circuit court held that Buck's deed conveyed a life estate to Garber with contingent remainders to his wife and children and the heirs of Buck and that a reversion in fee remained in Buck; that by the conveyance of Emma Buck, his devisee, and Luella Cutler, his heir, to Alvin R. Cutler, the contingent remainders were destroyed and Cutler became the owner of the premises in fee simple, and that by virtue of the subsequent conveyances he and his wife are each entitled to one-half the premises, subject to the life estate of Mrs. Buck.

The decree is based upon the hypothesis that the estate of Henry Garber was a life estate; that there were remainders to his wife and children and the heirs of Frederick Buck contingent upon conditions to be ascertained at the death of Garber; that in the meantime there remained a reversion in fee in Buck, and that by the conveyances mentioned the life estate merged in the fee and the contingent remainders were thus destroyed, as in the case of *Bond v. Moore*, 236 Ill. 576. In *Buck v. Garber*, *supra*, it was said that the deed from Frederick Buck was a present conveyance of a life estate to Henry Garber, with contingent remainders to his widow, (if he should marry and leave a widow,) to his unborn children and to the heirs of Buck. This statement was not required by any issue in the case, the judgment in no way rested upon it, and it is clearly wrong. The particular argument under discussion in the paragraph in which that statement occurs was, that the language of the deed which it was sought to eliminate amounted to a testamentary disposition of the property and was therefore void, and it was met by the proposition that there was no reason in law why a conveyance to a grantee for life, with remainder (if he leaves no widow or children) to the heirs of another, or if he does leave a widow, or both a widow and children, to her or to them, as the case may be, was not valid. The question considered was

whether the language was sufficient, in law, to pass the title presently as a deed of conveyance, and it was held that the words, though not accurately used, were sufficient to express the grantor's intention as to the manner in which the title should pass in the different events mentioned. The exact nature of the limitation, whether an executory interest or a contingent remainder, was not material and was not discussed but was erroneously assumed to be a contingent remainder. The material question in the case as to the conveyance was whether the language quoted was sufficient to show, under section 13 of the Conveyance act, that a less estate than a fee simple was limited by express words or appeared to be granted by construction or operation of law. It was contended that all the language quoted, except that reserving a life estate to the grantors, was ineffectual to limit the estate granted in any manner. That, and not the exact nature of the limitation, was the material question. Buck's contention was that his deed, if delivered, conveyed the fee simple to Garber. Garber disclaimed all interest and made no defense. His wife and children defended and claimed that the deed did not convey a fee simple to Garber but created future interests in them which were not vested in Buck by Garber's re-conveyance to him, and their contention was sustained.

Under sections 9 and 13 of the Conveyance act the deed to Henry Garber conveyed a fee simple except as the estate was limited by the language of the deed itself. (*Stoller v. Doyle*, 257 Ill. 369.) It was subject to three conditional limitations upon his death, dependent upon (1) his leaving no widow or children; (2) his leaving a widow and no children; (3) his leaving a wife and child or children. In any one of these cases the fee was ended. In the first case the land went to the heirs of Frederick Buck; in the second, one-half to the widow and one-half to the heirs of Buck; in the third, to the widow and children as the law directs. There is, however, a fourth case. Garber may sur-

vive his wife and leave children and no widow. The deed has created no limitation of the estate in such event. There is no restriction of his absolute ownership in that situation. His death under such circumstances will not end his estate but it will pass to his grantees, or, subject to his debts, will descend to his heirs or pass to his devisees. An estate in remainder is limited to take effect upon the termination of a particular precedent estate and not in abridgment of it. (*Stoller v. Doyle, supra.*) The estate conveyed to Garber may continue indefinitely and therefore is not a life estate. The future interests of his widow and children will take effect, if at all, in derogation of his estate created by the granting clause of the deed and therefore are not remainders but executory limitations.

It is argued that Henry Garber's estate in fee, being preceded by a life estate, will cease only if one of the contingencies shall happen during the existence of the preceding estate, in accordance with the rule that where an estate is limited after a particular estate, with a gift over upon the happening of an uncertain event, the gift over will take effect only upon the happening of the contingency during the existence of the particular estate. (*Lachenmyer v. Gehlbach*, 266 Ill. 11.) This rule, however, does not apply where the instrument creating the limitations shows an intention to refer the contingency to a later date than the termination of the particular estate. In this case there were two life estates preceding the limitation to Henry Garber: one to Fred Buck and the other to Emma Buck. The contingency upon which the gift over was limited was the death of Henry Garber leaving no wife or children, leaving a wife and no children, or leaving a wife and child or children. In the first contingency the gift over was to the heirs of Frederick Buck; in the second, one-half to the wife and the other half to the heirs of Frederick Buck. Since Frederick Buck could have no heirs in his lifetime, this gift to his heirs could not refer to death occurring in his lifetime.

Frederick Buck has died and Henry Garber has survived him; but this fact cannot affect the construction of the deed, for its meaning must be determined by the application of its language to the facts existing at the time of its delivery.

The decree of the circuit court is reversed and the cause remanded.

Reversed and remanded.

(No. 12339.—Judgment affirmed.)

THE CITY OF CHICAGO, Appellee, vs. THE WASHINGTONIAN HOME OF CHICAGO, Appellant.

Opinion filed June 18, 1919—Rehearing denied October 9, 1919.

1. ORDINANCES—*when buildings may be considered as one structure under ordinance for prevention of fire.* Under an ordinance requiring certain buildings having a floor space of 6000 square feet to be provided with automatic sprinklers for the prevention of fire, buildings which are so connected by passageways that they form, in fact, one structure and are used as one building may be considered as such in estimating the floor space.

2. SAME—*Statute of Limitations does not apply where violation of ordinance is a continuing offense.* Where an ordinance requiring certain buildings to be provided with automatic sprinklers for the prevention of fire provides that every day a building is occupied contrary to the ordinance shall be considered a distinct offense, the violation of the ordinance is a continuing offense, and the Statute of Limitations will not bar an action for the penalty for such violation while the building continues to be so occupied.

3. SAME—*ordinance may be proper exercise of police power although it results in inconvenience to individual.* A city may pass any reasonable ordinance necessary or proper to carry into effect the powers granted by the legislature, whether such powers are expressly conferred or are implied from the duty of the city to protect lives and property, even though inconvenience or loss to the individual results.

4. SAME—*ordinance in exercise of police power is presumed to be valid.* A party attacking an ordinance as an unreasonable or oppressive exercise of the police power has the burden of showing affirmatively and clearly where the unreasonableness exists, as the presumption is that the ordinance is valid.

5. SAME—*construction sustaining ordinance will be adopted, if possible.* Where one construction will sustain an ordinance in the exercise of the police power and another will defeat it, the court, if possible, will adopt the construction sustaining the ordinance.

6. SAME—*when ordinance requiring automatic sprinklers does not give arbitrary power to city officer.* In an ordinance requiring the owners of certain buildings to install automatic sprinkler systems, a provision that the plan for such installation shall be approved by the chief of the bureau of fire prevention does not give arbitrary power to that officer, who has authority only to approve the plan and not to say what system shall be installed.

7. SAME—*ordinance tending to prevent fires is within the police power.* Any regulation which tends to lessen the damage and dangers of fire and prevent the spreading thereof in densely populated cities is one which tends toward the protection of life and property of the public, and, if not oppressive and unreasonable, is a proper exercise of police power.

8. POLICE POWER—*exercise of police power may impair obligation of contracts.* The police power is the power of the State co-extensive with self-protection, and its exercise is not prohibited by the provision of the Federal constitution against the passage of laws impairing the obligation of contracts.

9. SAME—*police power of the State is recognized by Federal Supreme Court.* That which is recognized by the State Supreme Court as within the police power of the State is so recognized by the Supreme Court of the United States.

APPEAL from the Municipal Court of Chicago; the Hon. WELLS M. COOK, Judge, presiding.

A. W. MARTIN, and EDWARD H. S. MARTIN, for appellant.

SAMUEL A. ETTelson, Corporation Counsel, and HARRY B. MILLER, (DANIEL WEBSTER, of counsel,) for appellee.

Mr. JUSTICE STONE delivered the opinion of the court:

The appellant, the Washingtonian Home of Chicago, a corporation, was found guilty, after a trial without a jury in the municipal court of Chicago in an action to recover a penalty for the violation of paragraph (f) of section 16,

sections 18, 24 and 22*b* of the fire prevention ordinance of the city of Chicago, due to and arising out of its failure to equip on July 14, 1916, its buildings at 1533 Madison street, in said city, with an approved system of automatic sprinklers. The evidence consists of a written stipulation dated May 31, 1918, and certified portions of the fire prevention ordinance of the city of Chicago, of which the municipal court took judicial notice. Said ordinance was passed July 22, 1912, and has been at all times thereafter in full force and effect. The court found appellant guilty and rendered judgment for a fine of five dollars and costs.

Paragraph (*f*) of section 16 of said ordinance places every building used for a hospital, for housing of the sick and infirm, imbeciles or children, and every jail, police station, asylum, house of correction and detention, and every home for the aged and decrepit, where sleeping accommodations are provided for more than ten persons, in class II*c*. Section 18 of the ordinance provides that every building specified in subsequent sections of the ordinance which is in existence at the time of the passage of the ordinance shall be equipped with an approved automatic sprinkler system within two years from and after the date of the passage of the ordinance; that the owner of such building shall submit plans for such proposed sprinkler system for approval to the chief of the fire prevention and public safety department, in which plans shall be shown the size, capacity and location of all sprinkler heads, pumps, tanks or pipes, and any other apparatus to be used in connection therewith, within six months from and after the passage of the ordinance, which plans, when approved, shall be stamped showing such approval before the proposed sprinkler system shall be installed by the owner. Section 24 provides for an approved automatic sprinkler system on all floors and basements of non-fireproof buildings more than two stories in height and having an area of more than 6000 square feet, excepting certain rooms. Section 22*b* provides a penalty

for a violation of the provisions with reference to installing a sprinkler system of not less than \$5 nor more than \$200 for each offense, and each and every day such building is occupied contrary to said ordinance shall be considered a separate and distinct offense.

It is stipulated that the building of the appellant is not equipped with an approved system of automatic sprinklers; that the appellant is a charitable corporation and is not organized for profit, and in carrying out its corporate objects cares for certain inebriate patients without charge and makes charges for the care of certain patients able to pay; that the expenses of the institution equal in amount its receipts from certain charitable trust funds and other sources; that the appellant is endowed with valuable grounds and buildings thereon; that the insurance premiums would be reduced from \$1.16 for \$100 of insurance for one year to sixty-five cents by the installation of the proposed sprinklers; that the plans and specifications attached shall be a part of the stipulation; that the appellant conducts in the second, third, fourth and fifth stories in section "A" shown in said plan, and in all the stories of sections "B" and "C" shown therein, an institution for the care, cure and reclamation of inebriates and has since said building was erected; that all of the first floor of section "A" except the hall and entrance is occupied by stores, namely, a drug store, shoe store and grocery store, including the basements of the respective stores; that the stores contain the usual and ordinary oils and inflammable materials that are incident to such business; that section "A" of the building was built in 1875, section "B" in 1880 and section "C" in 1883; that all are lighted with gas; that there are hallways and communications between such sections; that all of said sections are in class IIc described in section 16a of the ordinance. The stipulation also sets out the material used in the construction of the outside walls and interior partitions. Defendant has been notified by the bureau of fire prevention

and public safety to install an approved system of automatic sprinklers as provided for in the ordinance and has never submitted plans for such system for approval or installed such a system. The stipulation also sets out a comprehensive description of an approved system of automatic sprinklers. It is also stipulated that in section "A" are sleeping accommodations for sixty-one persons, in section "B" for seven persons and in section "C" for forty-four persons; that said sections are operated as one building; that certain windows, rooms and fire-escape exits are barred with iron gratings, mostly permanent, and some locked with padlocks to prevent the escape of patients under treatment; that there are three padded cells with heavy doors, used for the confinement of violent patients, locked with padlocks when so used. The stipulation also contains a statement of the advantages of the use of a sprinkler system.

Appellant argues numerous assignments of error. Its principal contentions are, however, that the ordinance does not apply to the buildings and premises of the appellant; that the action is barred by the Statute of Limitations, and that the ordinance is unconstitutional and void because not within the power of the city council to pass.

In support of the first contention appellant cites section 24 of the ordinance, as follows:

"The following buildings hereinbefore referred to shall be equipped with an approved automatic sprinkler system, except as otherwise provided: * * *

"Class IIb and IIc buildings—On all floors and basements of non-fireproof buildings more than two stories in height, and having an area of more than 6000 square feet, except in sleeping rooms, reading rooms, parlors, bath rooms, dining rooms, smoking rooms, gymnasiums, and except hallways containing stair or elevator shafts enclosed with incombustible or fire-proof material."

The evidence and stipulation in the record show that said premises consist of three buildings used and operated

as one building. Said buildings are connected by passageways, so that they form, in fact, one structure. We are of opinion that the structures in question should be treated as one building. This being true, a computation shows the ground space occupied by said buildings amounts to more than 6000 feet. It is contended that the space referred to in the ordinance should be construed as being floor space and not ground space. If this contention be adopted it can avail appellant nothing, as the floor space on all floors would necessarily be computed. In either view of the matter it is clear that the buildings occupy more than 6000 square feet and come within the purview of section 24 of the ordinance.

As to appellant's contention that the Statute of Limitations applies, it is sufficient to say that the offense designated in the ordinance is a continuing offense, it being provided under section 22*b* of the ordinance that "each and every day that said building is so occupied contrary to this ordinance shall be considered a separate, distinct offense." The Statute of Limitations, therefore, does not apply.

The principal contention of appellant is that the city is without power to pass the ordinance in question. Such an ordinance, to be valid, must be within the police power of the State, which may be delegated to city councils. (*Biffer v. City of Chicago*, 278 Ill. 562; *Williams v. City of Chicago*, 266 id. 267; *City of Chicago v. Mandel Bros.* 264 id. 206.) Section 1 of article 5 of the Cities and Villages act provides the powers of city councils. An examination of paragraphs 61, 62, 63, 65, 66, 71, 75, 77, 78 and 98 shows that the city council has the general power to regulate the construction and maintenance of buildings of the character of the one in question here. A municipality has power to pass any ordinance which is necessary or proper to carry into effect the powers granted by the legislature. Such powers may be expressly conferred by the statute or may be implied from the duty imposed upon the city council to protect the lives, health and property of the public. (*City*

of *Chicago v. Mandel Bros. supra*; *Williams v. City of Chicago, supra*.) Reasonable regulations for the protection of the lives and the safety of citizens, as well as of property against destruction by fire, are within the powers delegated to the city and which may be exercised by it. (*Spiegler v. City of Chicago*, 216 Ill. 114; *Gundling v. City of Chicago*, 176 id. 340.) A power within the police power of a city may be reasonably exercised, even though such exercise may result in inconvenience or loss to the individual. In the case of *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, the court said: "All uses of property or courses of conduct which are injurious to the health, comfort, safety and welfare of society may be prohibited under the sovereign power of the State, even though the exercise of such power may result in inconvenience or loss to individuals. In this respect individual rights must be subordinate to the higher rights of the public. The power that the State may exercise in this regard is the overruling law of necessity, and is founded upon the maxim, *salus populi est suprema lex*. The existence and exercise of this power are an essential attribute of sovereignty, and the establishment of government presupposes that the individual citizen surrenders all private rights the exercise of which would prove hurtful to the citizens generally. (*City of Chicago v. Rogers Park Water Co.* 214 Ill. 212; *Mugler v. Kansas*, 123 U. S. 623.) While the general principle above announced is uniformly recognized, it is equally true that the owner of property has the right to make any use of it he desires that does not endanger or threaten the safety, health, comfort or general welfare of the public." Mr. Cooley, in his work on Constitutional Limitations, states the doctrine of the police power thus: "All contracts and all rights, it is held, are subject to this power, and regulations which affect them may not be established by the State but must also be subject to changes, from time to time, with reference to the well being of the community,

as circumstances change or as experience demonstrates the necessity." (Cooley's Const. Lim. 57.)

The police power is the power of the State co-extensive with self-protection, and has been termed, not inaptly, "the law of overruling necessity." Such power is not prohibited by that clause of the constitution of the United States which forbids the passage of laws impairing the obligation of contracts. (*Town of Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191.) Whether or not an ordinance is the proper exercise of police power is a judicial question. Is this ordinance a proper exercise of police power? We approach this question under the presumption of law that the ordinance is valid, and the rule of law places upon the party attacking an ordinance as an unreasonable or oppressive exercise of the police power, the burden to affirmatively and clearly show where the unreasonableness exists. (*People v. Village of Oak Park*, 266 Ill. 365.) Where two constructions are possible, one which will sustain the ordinance and the other which will defeat it, the court will adopt the construction sustaining the ordinance. *City of Chicago v. Oak Park Elevated Railroad Co.* 261 Ill. 478; *City of Benton v. Blake*, 263 id. 358.

The ordinance in question provides for the installation in buildings of the character of that of the appellant of a sprinkler system, of which the evidence shows there are a number of approved makes on the market, and the plan for the installation of a sprinkler system must be submitted to and approved by the chief of the bureau of fire prevention and public safety. Counsel for appellant urge that this provision is invalid, for the reason that it gives arbitrary power to an officer of the city. We do not so view it. The chief of the bureau of fire prevention and public safety is given power to approve the plan of installation, only. He has nothing whatever to say with regard to what system shall be installed. Section 18 of the ordinance provides as follows: "The owner or owners of all such buildings shall

submit plans for approval to the chief of fire prevention and public safety for such proposed sprinkler system, showing the size, capacity and location of all sprinkler heads, pumps, tanks or pipes, and any other apparatus which is to be used in connection with such sprinkler system. * * * Said plans, when approved, shall be stamped by him to that effect before such system shall be installed."

The question of approval of plans by an officer of a municipality was passed upon in the case of *Arms v. Ayer*, 192 Ill. 601, the question there arising under the Fire-escape act of 1897. That act provides that the "number, locality, material and construction of such escapes shall be approved by the inspector of factories." This court in that case said: "The first objection made to the statute by counsel for appellees is that it imposes legislative power upon the inspector of factories, in that it authorizes him to determine how many, and in what position, fire-escapes shall be placed, etc. It must be admitted that the act is loosely drawn, but the rule that it is the duty of courts to so construe statutes as to uphold their constitutionality and validity, if it can be reasonably done, is so well established that the citation of authorities is needless. In other words, if the proper construction of a statute is doubtful, courts must resolve the doubt in favor of the validity of the law. Statutes and city ordinances providing for fire-escapes are usually somewhat general in their enactments, and necessarily so, for the reason that it is impossible for the legislature to describe in detail how many fire-escapes shall be provided, how they shall be constructed and where they shall be located in order to serve the purpose of protecting the lives of occupants, in view of the varied location, construction and surroundings of buildings; and hence, so far as we have been able to ascertain, acts similar to the first section of this statute have been sustained in other States, though perhaps the question here raised has never been directly presented. (*Rose v. King*, 49 Ohio St. 213; *Willy v. Mulledy*, 78

N. Y. 310; *Pauley v. Steam Gauge and Lantern Co.* 15 L. R. A. 194; *Schott v. Harvey*, 105 Pa. St. 222; *Orin v. Steinkamp*, 54 Ohio St. 284; *Sewell v. Moore*, 166 Pa. St. 570; *Keely v. O'Conner*, 106 id. 321; 2 Pa. Dist. Rep. 623.) The general rule is, that a statute must be complete when it leaves the legislature,—as to what the law is,—leaving its execution to be vested in third parties. Thus, it was said in *Dowling v. Lancashire Ins. Co.* 92 Wis. 63: "The result of all the cases on this subject is, that a law must be complete in all its terms and provisions when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors or other appointee or delegate of the legislature, so that in form and substance it is a law in all its details *in presenti*, but which may be left to take effect *in futuro*, if necessary, upon the ascertainment of any prescribed fact or event.' And it is said in Sutherland on Statutory Construction (sec. 68): "The true distinction is between a delegation of power to make the law, which involves a discretion as to what the law shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no objection can be made.' In *People v. Reynolds*, 5 Gilm. 1, it was held that to establish the principle that whatever the legislature may do it shall do in every detail or else it shall go undone, would be almost to destroy the government. It is there said (p. 13): 'Necessarily, regarding many things especially affecting local or individual interests, the legislature may act either mediately or immediately. We see, then, that while the legislature may not divest itself of its proper functions or delegate its general legislative authority, it may still authorize others to do those things which if might properly yet cannot understandingly or advantageously do itself. Without this power legislation would become oppressive and yet imbecile.' " Concerning the objection that the ordinance confers judicial powers on an

officer of the city, this court further said in the *Arms case*: "Of still less force is the objection that the act confers judicial power upon the inspector of factories. The inspector is given no power to judicially determine any question but acts ministerially in the supervision of the building of fire-escapes. Judicial power is 'the power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the law.' The judicial power is never extended to cases of the exercise of judgment in the execution of a ministerial power.—*Owners of Lands v. People*, 113 Ill. 296."

In the case of *Spiegler v. City of Chicago*, *supra*, where it was sought to enjoin the enforcement of what was known as the "drip-pan ordinance," which ordinance required that the drip-pans or devices used by auto vehicles shall be subject to the approval of the commissioner of public works, this court said: "The power to legislate is not conferred by said ordinance upon the commissioner of public works, but he is only given power to approve the drip-pans or other devices with which said 'tank wagons or other wagons or vehicles' are equipped. The power thus conferred upon the commissioner of public works pertains solely to the execution of the ordinance and not to the passage thereof."

The ordinance in question is not subject to the objection urged. The sprinkler apparatus is designed to prevent the spreading of fire and to put out fires in their incipient stages, and the testimony in this record tends to establish that they are efficient in so doing. Any regulation which tends to lessen the damage and dangers of fires and prevent the spreading thereof in densely populated cities is one which tends toward the protection of life and property of the public, and is therefore, unless oppressive and unreasonable, a proper exercise of police power. The ordinance in question is not shown by the record to be oppressive in its application to appellant. It owns and is possessed of valuable property at the corner of Madison and Ogden ave-

nues, in the city of Chicago. This, the evidence shows, is a populous section of the city. The building is occupied by patients suffering from the effects of alcohol, making it necessary to have a large portion of the windows barred with iron grates. The evidence also shows that windows to the fire-escapes are thus grated and are padlocked. The nature of the ailment of the patients in this building is such as to make them at times unruly and difficult to handle. Especially would this appear to be true in the case of fire. The cost of the installation of this system in appellant's property is shown to be about \$5500, while the value of the property is shown by the record to be considerably over \$150,000. The record also shows that a saving in insurance premiums owing to the installation of a sprinkler system would pay the expense of such system in approximately thirty years. Considering these facts, together with the fact that such system is a protection to the property of appellant, it becomes apparent that such requirement is not oppressive. The ordinance is general in its application. It applies to all buildings coming within the character of the one described by its terms and therefore cannot be said to be discriminatory.

It is also contended that the ordinance is void on the ground that it violates the Federal constitution. That which is recognized by the State as within the police power of the State is so recognized by the Supreme Court of the United States. *Cusack Co. v. City of Chicago*, 242 U. S. 526.

We are of the opinion that the ordinance in question was a reasonable exercise of the police power delegated to the city council and that it did not violate the State or Federal constitution. The judgment of the municipal court will therefore be affirmed.

Judgment affirmed.

(No. 12661.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. GALE ALLEN, Plaintiff in Error.

Opinion filed June 18, 1919—Rehearing denied October 10, 1919.

1. CRIMINAL LAW—*when question of admissibility of complaint of prosecutrix is waived.* In reviewing a prosecution for rape, any question of the admissibility of the testimony of the prosecuting witness as to her complaint made seven months after the alleged assault is waived where the record does not show any objection to such testimony, although an objection was made and overruled when the question was afterwards asked of the girl's mother.

2. SAME—*when evidence of unchastity of prosecutrix is admissible.* Where the defense to a charge of forcible rape is consent and the woman is of the age of consent, evidence of her reputation for unchastity is competent as bearing on the probability of her consent, but the evidence must be confined to her general reputation before the act charged.

3. SAME—*when there is no abuse of discretion in sentencing a defendant to penitentiary rather than to reformatory.* Under the Parole law of 1917 there is no abuse of discretion in sentencing a defendant twenty years of age to the penitentiary for the crime of rape instead of to the reformatory, where the matter was not presented to the trial court or any facts shown to influence the exercise of its discretion.

THOMPSON, J., dissenting.

WRIT OF ERROR to the Circuit Court of Jefferson county; the Hon. CHARLES H. MILLER, Judge, presiding.

WILLIAM H. GREEN, and CONRAD SCHUL, (NOLEMAN & SMITH, of counsel,) for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, FRANK G. THOMPSON, State's Attorney, and JAMES B. SEARCY, for the People.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The writ of error in this case is prosecuted to reverse the conviction and sentence of the plaintiff in error, Gale

Allen, in the circuit court of Jefferson county, for the crime of rape committed upon the person of Elsie Dalby.

Gale Allen, plaintiff in error, lived with his parents on a farm in Elk Prairie, in Jefferson county, and Elsie Dalby lived with her parents on a farm five or six miles from the home of the plaintiff in error. They had been at school together when children but had not met for several years, when on Sunday, July 23, 1916, he drove to her home in a buggy and at his invitation she went with him to the town of Bonnie, a small village four or five miles east of her home. They left her home about 5:30 in the afternoon, and, after driving around Bonnie and having some discussion about going to church, they left Bonnie about sundown and drove back to her home. She testified that about half-way between Bonnie and her home the act was committed by him in the buggy, forcibly and against her will, and that she resisted as long as she could and tried to bite him and kicked and scratched him until she suffered a physical collapse and lost consciousness. He denied that the act was committed either forcibly or by consent or that there was ever at any time or place any such relation between them. His parents testified that when he came home he did not bear any marks, bruises or scratches and none were observable the next morning. As to the fact of an improper relation having existed at other times by consent, there was testimony of witnesses of conversations with the plaintiff in error inconsistent with his testimony, and also testimony of a brother of Elsie Dalby of a remark by plaintiff in error to her inconsistent with his story in that respect and resulting in a proposition for a fight. These statements were denied by plaintiff in error, but it is apparent that the conclusion of the jury rested on the credibility of the witnesses. The jury being convinced that Elsie Dalby told the truth and the trial court having concurred in that conclusion, the judgment cannot be reversed because it is not based on sufficient evidence.

Elsie Dalby testified that the plaintiff in error, after the alleged assault, kept her in the buggy, told her to keep her mouth shut and made serious threats of violence if she did not. She said that she made complaint to her father and mother in February, 1917, when her condition became such that she could not avoid it, and that she did not make complaint before for fear of plaintiff in error. It is contended that it was error to permit her to testify to her complaint about seven months after the alleged assault, but the abstract of the record does not show any objection to the testimony. An objection was afterward made when the question was asked of the mother and it was then overruled, but the fact had already been proved without objection and any question about it had been waived.

As a reason for not sooner complaining of the alleged assault, Elsie Dalby testified to the threats of plaintiff in error, and three members of the grand jury testified that in her examination before that body she said plaintiff in error did not make threats, and one of them said that she answered that he did not hurt her in the scuffle. She denied that she made any such statements before the grand jury. The question whether the excuse for not making immediate complaint was sufficient was for the jury.

It is also urged that evidence of the birth of a child was prejudicial and should not have been admitted, but here, again, the abstract shows no objection to the evidence.

There was a motion for a new trial based on affidavits of various persons of specific acts of unchastity by the witnesses with Elsie Dalby, and counter-affidavits. Where the defense to a charge of forcible rape is consent and the woman is of the age of consent, evidence of her bad character for chastity is competent as bearing on the probability of her consent to the act with which the defendant is charged, because it is more probable that an unchaste woman assented to such an act than a virtuous woman. Whether such evidence is admissible where the defendant

denies the commission of the act is not now considered, but in any case it must be confined to general reputation before the act charged. (*Shirwin v. People*, 69 Ill. 55; 22 R. C. L. 1208; 33 Cyc. 1478.) Most of the alleged acts were subsequent to July 23, 1916, and while the affidavits were contradicted, none of them would have been admissible in evidence upon another trial and the overruling of the motion was not error.

It is argued that the court erred in giving instructions 1, 2, 5, 9 and 12 at the instance of the People and in refusing instruction 31 offered by the defendant. There was no error in ruling on those instructions, and the instructions, considered as a series, were as favorable to the defendant as the law would permit.

Although the abstract does not contain the verdict or sentence, there was testimony that the plaintiff in error was twenty years old, and counsel on both sides say that he was sentenced to the penitentiary for a term of two years. It is insisted that the court abused its discretion in sentencing the defendant to the penitentiary instead of the State reformatory. This, of course, concedes that the character of the sentence was to be governed by the Parole law of 1917, in force at the time of the trial, which gives to the court discretion to sentence every male person between the ages of sixteen and twenty-six years (except in capital cases) to the reformatory instead of the penitentiary. It does not appear that the question was presented in any manner to the court or any facts brought to light to influence the exercise of the discretion. This court cannot say that there was an abuse of discretion in sentencing the defendant to the penitentiary for the crime of which he was convicted.

The judgment is affirmed.

Judgment affirmed.

MR. JUSTICE THOMPSON, dissenting.

(No. 12616.—Reversed and remanded.)

HORACE B. HARRIS, Admr., Appellant, *vs.* CHARLES W.
FLACK *et al.* Appellees.

Opinion filed June 18, 1919—Rehearing denied October 9, 1919.

1. CLOUD ON TITLE—*equity appointing trustee for sale of real estate has jurisdiction to remove cloud.* A complainant in a bill for the appointment of a trustee, with power and direction to sell real estate under the terms of a will, may secure a decree removing a cloud upon the title to the real estate, as the power to decree the sale carries with it the power to provide that a good title shall be had in the purchaser.

2. DEEDS—*definition of duress.* Duress is a condition which exists where one by the unlawful act of another is induced to make a contract or to perform or forego some act under circumstances which deprive him of the exercise of free will.

3. SAME—*mere annoyance will not constitute duress.* Mere annoyance or vexation will not constitute duress, but there must be such compulsion affecting the mind as shows that the execution of the contract or other instrument is not the voluntary act of the maker.

4. SAME—*trust deed is not ratified when duress under which it was executed continues to operate.* While a deed obtained under duress may be ratified after the coercing influence has ceased to operate, yet where it is evident that a trust deed was obtained by a threat of forcing the grantor into court through conservatorship proceedings, an alleged ratification of said deed by the grantor while still under the same fear is of no effect.

APPEAL from the Circuit Court of Fulton county; the
Hon. GEORGE W. THOMPSON, Judge, presiding.

MILLARD R. POWERS, for appellant.

GUMBART & GRIGSBY, CHARLES WOLFF, and CHIPER-
FIELD & CHIPERFIELD, for appellees.

Mr. JUSTICE STONE delivered the opinion of the court:

This is an appeal from a decree of the circuit court of Fulton county denying that portion of the prayer of complainant's bill asking for the removal of a certain trust deed

as a cloud upon the title to lands described in the bill. The relief sought by the bill is the appointment of a trustee to sell real estate in accordance with the terms and provisions of the last will and testament of Mary M. Harris, deceased, and to remove as a cloud on the title to lands described in the bill of complaint a certain trust deed executed and delivered by Mrs. Harris, on the ground that said instrument was executed under duress, undue influence and fraudulent representations, and on the further ground that the trust deed, if voluntary, constitutes and is a testamentary instrument not executed and witnessed as required by the statute on wills. The decree appointed a trustee with power to sell certain real estate, but the chancellor held the complainant not entitled to the relief sought as to 240 acres of said land, which 240 acres constitute the land in question here. No cross-errors are assigned to this decree.

Charles W. Flack and John C. Lawyer were made parties defendant, for the reason that at the time the bill was filed they were claiming some right to the lands by reason of certain contracts which they had with the heirs of Mary M. Harris and by reason of a certain deed from John S. Warner and wife, under which they were claiming a one-seventh interest in the lands in question. The contracts were by this court held void as contrary to good morals and public policy. (*Flack v. Warner*, 278 Ill. 368.) The claim of the defendants Flack and Lawyer, therefore, are based on the warranty deed.

Mary M. Harris died September 7, 1915, leaving a last will and testament dated October 5, 1910, and a codicil thereto under date of December 28, 1910, both duly proven and admitted to probate by the county court of Fulton county, of which county Mrs. Harris was a resident at the time of her death. The will and codicil, after providing for the payment of debts, give and devise all her real and personal estate in trust to James C. Hammond, the executor therein named, and in case of his not acting as such execu-

tor then to the executor who qualifies, with power to sell and dispose of the same at public or private sale upon such terms and in such manner as he may consider will yield the largest amount, and further give, devise and bequeath certain specified sums of money to be paid to the legatees therein named. Hammond, the executor nominated in the will, refused to act, and the complainant, Horace B. Harris, who had acted as conservator for Mrs. Harris from 1913 to her death, was appointed administrator with will annexed.

The assets of the estate consist of certain mortgage loans, accounts, personal property, money, and three pieces of real estate described in the bill of complaint. The title to the real estate in question was of record in the name of Mary M. Harris at the time of her death, free and clear of all incumbrance, except as the title is affected by a certain trust deed executed, acknowledged and delivered by Mrs. Harris on November 25, 1910, and recorded March 1, 1911, which provides, in substance, that the grantor, Mary M. Harris, widow of Jonas R. Harris, deceased, "for and in consideration of one dollar and other good and valuable consideration to her paid, does hereby assign, transfer, set over, demise, alien and convey to James C. Hammond, of the same township, county and State, * * * all her right, title and interest in and to all of the real estate and personal property, of every kind and nature, that she has acquired and will become entitled to through the said Jonas R. Harris by reason of his death, as his widow and as one of his heirs," etc. The real estate therein described is all the real estate owned by Jonas R. Harris, her husband, at the time of his death, amounting to 680 acres, "to have and to hold the same, however, in trust for the following purposes." The instrument then sets out said purposes, to the effect that the trustee shall take possession and charge of all the property therein described except the household furniture, and shall manage the same for the benefit of Mrs. Harris during her lifetime, she to receive the profits thereof,

"and at her death said property to go as hereinafter provided." After providing for the making of repairs, payment of taxes, etc., by the trustee, together with his fees, and that Mrs. Harris should have the privilege of having a home in the village of Table Grove, Illinois, or elsewhere, and after providing for certain funds for her use for religious, educational and charitable purposes, the instrument provides that on the death of Mrs. Harris the trustee or his successor in trust shall by proper deeds convey certain lands not here involved. Said instrument, after providing for the division of her property, upon her death, among her different relatives, provides as follows: "Upon the death of the said Mary M. Harris this trust shall be fully executed and the *cestuis que trust* shall thereupon be entitled to the property in the proportion herein before provided, and the trustee shall thereupon distribute the personal property among them, and they shall have the right to take possession of the real estate above described."

This is the third time that the subject matter of this controversy has come to this court. The principal question still remaining in the matter is whether or not the trust deed of November 25, 1910, is a valid deed. If it is, the property in question here was transferred thereby to the trustee for distribution. If the deed is not valid the property passed under the will.

It is contended by appellees that even though the trust deed were invalid appellant could not, in a bill for the appointment of a trustee with power and direction to sell the real estate, secure a decree removing a cloud upon the title of the same. With this contention we cannot agree. The court had jurisdiction of the parties and of the subject matter and had power to decree the appointment of a trustee and direct the sale of the property. As the power to decree such sale carries with it the power to provide that a good title shall be had in the purchaser thereof, it follows the court had jurisdiction to remove a cloud on such title.

Mary M. Harris became seized in fee of the lands herein involved, described as the south half of the northwest quarter and the southwest quarter of section 36, town 5, north, range 1, west of the fourth principal meridian, in McDonough county, by virtue of a decree of the circuit court of said county in partition confirming the report of commissioners appointed in said proceedings, which report sets over the real estate to her as her share under her rights as set out in the partition proceedings. This decree was entered February 16, 1911, nearly three months after the trust deed was executed. There is nothing in the record tending to indicate that the existence of the trust deed was disclosed in the partition proceedings or that the trustee therein named was made a party to the partition suit. The trust deed was not recorded for nearly two weeks after the decree in partition was entered.

Duress has been defined as a condition which exists where one by an unlawful act of another is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will. (14 Cyc. 1123.) Mere annoyance or vexation will not constitute duress, but there must be such compulsion affecting the mind as shows that the execution of the contract or other instrument is not the voluntary act of the maker. *Mitchell v. Mitchell*, 267 Ill. 244; *Kronmeyer v. Buck*, 258 id. 586; *Huston v. Smith*, 248 id. 396; *Hintz v. Hintz*, 222 id. 248; *Dorsey v. Wolcott*, 173 id. 539; *Hagan v. Waldo*, 168 id. 646.

It appears from the evidence that Jonas R. Harris, husband of Mary M. Harris, died September 24, 1910, and that a short time thereafter certain of his relatives and the relatives of Mrs. Harris became concerned lest she dispose of her property to their disadvantage. It appears that she made her will on the 5th day of October, 1910, a few days after the death of her husband. It also appears from the record that these relatives knew that she had made this

will; that they engaged appellee Charles W. Flack, of the firm of Flack & Lawyer, a firm of attorneys of Macomb, Illinois, and entered into an agreement with him by which Flack agreed that said firm would "render all legal services necessary or that may be required in controlling or advising with Mrs. Mary Harris and in prosecuting any suit or suits for the appointment of a conservator for Mrs. Harris or the setting aside of a will or any other legal documents." The record discloses that the contract of said firm was made with Flack and that he rendered the services thereunder. In return for these services Flack & Lawyer were to receive one-third of all that should be collected from Mrs. Harris or from her estate after her decease. It further appears that on November 23, 1910, in pursuance of these agreements Flack procured the commencement of proceedings in the county court of McDonough county for the appointment of a conservator for Mrs. Harris. The petition was filed in the name of John Warner, Ralph Warner and John M. Davis, on the advice and direction of Flack, who prepared the petition. The petition averred that Mrs. Harris was a distracted and feeble-minded person, who by reason of unsoundness of mind was incapable of managing and caring for her own estate and that her estate was in danger of being greatly diminished by Daniel O. Harris, who, the petition states, "apparently controls and dominates the action and conduct of said Mary Harris." The evidence shows that service of summons in the conservatorship proceedings was had upon Mrs. Harris on November 23; that on November 24 she went to the office of Flack & Lawyer for the purpose of explaining to them that she had a contract with James C. Hammond to manage her estate for her, she feeling that that should be sufficient to avoid such proceedings. The evidence also shows that on that day she had a conversation with the appellee Flack, who stated to her that such a contract was not satisfactory to his clients but that he could draw an instrument that would be, and

for her to return the next day, which she did in company with Hammond and others, going at his instance and request to the office of George D. Tunnicliff, who, the evidence shows, had nothing to do with the attempt to control Mrs. Harris in the disposition of her property. Flack later came to the office of Tunnicliff. There were present numerous of her relatives, including the ones who signed the petition for the appointment of a conservator. She beseeched her brothers John and Ralph to dismiss the petition, but they refused to talk to her. The evidence shows that she was nervous, and although advised by Tunnicliff to contest the petition for conservator, she expressed a fear of going into court. When the deed was read to her and the statement in the acknowledgment thereto that it was her own voluntary act, she exclaimed, "No! I cannot say that!" or words to that effect; that thereupon Flack said, "Well, everything stops right here," and that she thereafter said, "I will say it is the best I can do now," and that she signed the paper and left the office. It is evident that prior to and at this time there was a definite plan on the part of the relatives of Mrs. Harris, and of Flack, who by contracts with the relatives became directly interested in securing the trust deed, to force Mrs. Harris to execute the same, and that as a part of the plan, and as the potential means of carrying out the same, the petition for the appointment of a conservator was filed. Nothing further was done concerning the proceedings and they were later dismissed. The evidence shows that upon the receipt of summons in the proceedings for the appointment of a conservator Mrs. Harris was very nervous and called for her nephew, Horace B. Harris, to come to her house on the evening of the service of the summons; that he and his wife went to see her; that she was crying when they arrived and handed Horace the summons and said, "Look what they have done to me!" When asked why she did not go to court she replied that she could not; that she was never in court and could not go, and asked

Horace to take her to the office of Flack & Lawyer that she might show them the contract she had with Hammond, so that the proceedings might be avoided. The evidence also shows that upon her return home after making the deed on November 25 she was very nervous and crying; that when asked concerning her trouble she replied that they had made her sign what they called a trust deed and she did not want to sign it. Upon being asked why she signed it, she replied that they told her that she had to. The evidence also shows that she did not cease worrying about this trust deed; that she talked almost continuously about the deed until she became a burden to those about her. She very frequently expressed the fear of a conservator. The matter seemed to be almost continuously upon her mind. It appears that after the making of the deed her health was poor and that she was in a very nervous condition.

Upon an examination of the entire testimony in this record we are of the opinion that at the time Mary M. Harris made the trust deed she was under such compulsion, through fear of the conservatorship proceedings, as to affect her mind and that the trust deed was not her voluntary act. The whole of the activities of her relatives and appellee Flack in this case evidences a scheme to deprive this woman of her right to make such disposition of her property as she might see fit. It is evident from the record that none of them considered that any argument which they might present to her would cause her to enter into this trust deed. It is therefore clearly apparent that the conservatorship proceedings were instituted for the sole purpose of overcoming her will and forcing her to do that which they realized and admit they could not induce her to do by any legitimate argument. Such a scheme was an unlawful attempt on their part to interfere with the natural rights and interests of Mrs. Harris, and this court so held in *Flack v. Warner*, *supra*, where the contract of Flack & Lawyer to assist in doing this identical thing was held

to be void, as contrary to good morals and against public policy. There is not a scintilla of evidence in this record that Mrs. Harris would have executed the trust deed, or could have been induced to do so, had the petition not been filed. The record does show that she frequently said after the deed was made that she did not want to make it but that they made her do so. It is but fair to presume, therefore, that the filing of such proceedings and the fear aroused in her mind thereby were the compelling and controlling force which brought about the execution of the trust deed and that the same was not her voluntary act.

In the case of *Bane v. Detrick*, 52 Ill. 19, Bane secured a warrant for the purpose of coercing the payment of a claim. Through said means he secured a certain mortgage from the appellee, Detrick. It was there held that the securing of the warrant was sufficient duress to avoid the transaction, and that this was true even though the arrest, if it had been made, would have been illegal. It was there held that by reason of such duress appellee's agreement was not an act in the exercise of his free agency. To the same effect is the case of *Willetts v. Willetts*, 104 Ill. 122, where a wife released her dower in her husband's lands and estate under circumstances showing that her acts were so affected by duress and undue influence of her husband that the act of releasing her interest was not her voluntary act.

But it is urged by appellees that on August 30, 1911, by an instrument in writing Mary M. Harris ratified the trust deed, and that the trust deed, even if procured through duress and undue influence, was not void but voidable, only, and that therefore it was subject to such ratification. It appears that on the 4th day of February, 1911, Mrs. Harris served notice on Hammond canceling and annulling the trust deed. Thereafter, on August 30, 1911, she signed what the appellees contend is a ratification of the trust deed. Said instrument, after reciting the cancellation and annulment

of the trust deed and that no further action had been taken on such cancellation, recites: "Now, therefore, this indenture witnesseth that I have and I do hereby withdraw the said paper by which I attempted to cancel, annul and terminate said trust deed to the same, and I hereby re-affirm said trust deed and all its parts." It is contended by appellant that this does not amount to a ratification, for the reason that Mrs. Harris was not at any time free from duress and that the same was not her voluntary act. There is much evidence in the record that she was not strong mentally or physically; that she spent most of her time alone on the farm; that she brooded continuously after the making of the trust deed over what she deemed a great injustice done her by her relatives. It also appears from the evidence that she had sought to get funds from the trustee, Hammond, with which to procure a home in Table Grove; that he refused to give her money unless she would go to Macomb and sign a paper for it; that she eventually did go to Macomb and that the paper she there signed was this so-called ratification. We are of the opinion that at no time after the instituting of the conservatorship proceedings was she free from fear of the same. She frequently expressed to those about her the fear of such proceedings.

It is evident from the record in this case that Mary M. Harris after the filing of the petition for appointment of a conservator over her was under fear of such proceedings at the hands of those who had brought about the situation created through the trust deed. There is much evidence in the record that she was not a woman of strong mentality; that her mental powers grew weaker, until in 1913 a conservator was appointed for her. With this record before us we are convinced that the whole matter had but one purpose, and that was to prevent her making such disposition of her property as she chose. There is no claim on the part of the appellees that these transactions were insti-

tuted or the plans carried out for the purpose of protecting the interests of Mrs. Harris, but the purpose conceived in the whole matter appears well expressed in the contract of Flack with certain of her relatives, wherein the firm agree to give their services in "controlling" Mrs. Harris in the disposition of her property. While a deed obtained under duress may be ratified after the coercing influence has ceased to operate, it is evident, here, that such coercing influence did not cease to operate between the making of the trust deed and the so-called ratification. It follows, therefore, that the cases cited by the appellees on this point are not applicable, as it cannot be contended that a ratification of an instrument can be made so long as the influence of coercion continues. The rule is well stated in Story's Equity Jurisprudence, in section 348, where it is said: "If the party is still acting under the presence of the original transaction or the original necessity, and of the delusive opinion that it is valid and binding upon him, then, under such circumstances, courts of equity will hold him not barred from relief by any such confirmation." We are of the opinion that the trust deed is void, and that it, and the purported ratification thereof, should be held for naught.

As the views herein expressed dispose of the issues in the case it is not necessary to consider further concerning the validity of the trust deed.

The decree of the circuit court will be reversed and the cause remanded, with directions to that court to enter a decree granting the prayer of the bill.

Reversed and remanded, with directions.

Mr. JUSTICE THOMPSON took no part in this decision.

(No. 12655.—Judgment affirmed.)

THE ILLINOIS INDEMNITY EXCHANGE, Plaintiff in Error,
vs. THE INDUSTRIAL COMMISSION *et al.*—(KNUT HANNIBAL, Defendant in Error.) .

Opinion filed October 27, 1919.

1. **WORKMEN'S COMPENSATION**—*when the Industrial Commission may make award against insurance company.* Where an employer has insured his liability for injuries to his employees and on electing to operate under the Workmen's Compensation act has a rider attached to his policy to make it "cover such legal liability of the assured as is imposed by the aforesaid law," the Industrial Commission, under section 28 of the act, may make an award against the insurance company as being primarily liable, provided the employer is insolvent and the claim is proper, regardless of a provision in the original policy that no action shall be brought against the company except for reimbursement of an amount actually paid by the employer.

2. **SAME**—*Compensation act should be liberally construed.* The Workmen's Compensation act should be liberally construed in order to accomplish its purpose of making a speedy disposition of the claims of injured employees.

3. **SAME**—*section 23 of Compensation act prevents release to insurance company which is primarily liable.* Where the employer is insolvent and his insurer is primarily liable under section 28 of the Workmen's Compensation act, a release by the employee of his claim against the insurance company is void, under section 23 of the act, when made without the approval of the Industrial Commission.

4. **INSURANCE**—*dissolution of partnership does not necessarily render policy void—waiver.* Where an employer, as a member of a firm, insures his liability for injuries to his employees, a dissolution of the partnership does not necessarily render the policy void, and where the insured continues in the business alone, any statement by the insurance company recognizing the policy as valid will be treated as a waiver of any defense on account of the dissolution of the partnership.

WRIT OF ERROR to the Circuit Court of Cook county;
the Hon. OSCAR M. TORRISON, Judge, presiding.

WILLIAM MCKINLEY, and L. F. BINKLEY, for plaintiff
in error.

BOWE & BOWE, and JOHN E. ERICKSON, (AUGUSTINE J. BOWE, of counsel,) for defendant in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was a proceeding before the Industrial Commission for recovery under the Workmen's Compensation act. Knut Hannibal, the applicant, was injured December 16, 1913, while in the employ of Harry Edlund, who was doing business in repairing and manufacturing wagons in Chicago under the name of the North Side Carriage and Wagon Company. While he was planing a board Hannibal's right hand was torn in such a way as to cause the loss of the thumb and index finger. The cause was referred to an arbitrator, who dismissed the proceedings on the ground that the Industrial Commission was without jurisdiction as to plaintiff in error. The Industrial Commission reversed the decision of the arbitrator and entered an award against the plaintiff in error for \$1010. The circuit court of Cook county reversed the decision of the Industrial Commission and remanded the cause, on the ground that there was no evidence in the record justifying the award. The Industrial Commission on a second hearing again entered an award for \$1010, and on a hearing in the circuit court on writ of *certiorari* the finding of the Industrial Commission was confirmed, the circuit judge certifying that in his opinion the cause was one proper to be reviewed in this court, and it has been brought here by writ of error.

We find very little dispute in the record as to the main facts concerning the cause and extent of the accident. It is conceded that the employer and employee were operating under the Workmen's Compensation act. The only controversy in the record is as to whether the Industrial Commission had jurisdiction to fix any liability as to plaintiff in error, the insurance company. Edlund was formerly in partnership with Harry Dennison. While so associated they

were insured October 15, 1913, by plaintiff in error. This contract of insurance indemnified Edlund and Dennison up to an amount not exceeding \$10,000 in respect of any one accident, provided that in no event should the company be liable to exceed \$5000 for damages or injuries to any one person, and providing further that no action for indemnity under said insurance contract "shall be against the exchange except for reimbursement of the amount of loss actually sustained and paid in money by the assured in full satisfaction of a judgment duly recovered against the assured after final determination of the litigation." Attached to this contract of insurance was a rider dated October 15, 1913, reading as follows: "The assured under this contract having elected to operate under the so-called Workmen's Compensation act, [of 1913,] * * * in consideration for the premium for which this contract is issued, this contract is hereby intended to cover such legal liability of the assured as is imposed by the aforesaid law, including any amendments thereto made after this date. This indorsement is subject to all conditions, agreements and limitations of the contract as stated herein." Dennison withdrew from the partnership about the first week in November, 1913, Edlund having bought out his interest. On December 31, 1913, plaintiff in error paid Edlund \$250 on account of the injury to Hannibal, and Edlund gave plaintiff in error a release stating, among other things, that it was "in full payment and satisfaction of indemnity of every name, nature and description whatsoever which has accrued in my favor against the said Illinois Indemnity Exchange, and more especially on account of a certain contract dated on the 15th day of October, 1913, whereby the Illinois Indemnity Exchange agreed to indemnify me against accidents, not to exceed \$5000 for any one accident. It is understood by and between the parties that this release is given to cover only the case of Knut Hannibal, injured on December 16, 1913, and that I hereby covenant and agree to hold

the said Illinois Indemnity Exchange harmless and to reimburse them in full for any money that they may be compelled hereafter to pay by reason of the said injury to Knut Hannibal on December 16." Edlund cashed the check for the \$250 so received and gave the proceeds to Hannibal, the money apparently being used to apply on the hospital expenses. Hannibal at the time he received this payment of \$250 signed a general release to the North Side Carriage and Wagon Company for the accident in question.

Section 28 of the Workmen's Compensation act provides: "Any person, who shall become entitled to compensation under the provisions of this act, shall, in the event of his inability to recover such compensation from the employer on account of his insolvency, be subrogated to all the rights of such employer against any insurance company, association or insurer which may have insured such employer against loss growing out of the compensation required by the provisions of this act to be paid by such employer, and, in such event only, the said insurance company, association or insurer shall become primarily liable to pay to the employee or his personal representative the compensation required by the provisions of this act to be paid by such employer." The act also makes provision for the employer insuring payments to employees in accordance with the act, section 26 of the act providing in some detail as to the method of insurance, apparently with the object of securing the payments to the employee in such manner and at such times as the compensation is provided for by the act.

It is argued by counsel for plaintiff in error that the Industrial Commission can only determine questions arising between employer and employee or their personal representatives; that in construing grants of power to inferior courts or bodies of limited jurisdiction nothing is held to be granted by implication which is not necessary to the full exercise of the powers expressly granted. (*School Inspectors v. People*, 20 Ill. 526; *County of Hardin v. Mc-*

Farlan, 82 id. 138; 12 Ency. of Pl. & Pr. 155.) They argue that as section 28 contains no provision as to procedure when a claim is subrogated, therefore the procedure would apply that would ordinarily be followed where one party is subrogated to the rights of another, and that a judgment would first have to be procured by the injured workman and an independent proceeding then had in court against plaintiff in error before the claim would be enforceable; that the rights of the employer against an insurance company are those of insurance and not of compensation, and the rights of the injured workman as to the employer are those of compensation and not of insurance.

In the latter part of section 28 it is provided that "said insurance company, association or insurer shall become primarily liable to pay to the employee or his personal representative the compensation required by the provisions of this act to be paid by such employer." While the question is not entirely free from doubt, it would appear to be a fair construction of section 28 that the legislature intended, under certain conditions, to charge the liability directly to the insurer, and it is not an unreasonable construction to hold it also intended to include the method of collection in compensation cases within the meaning of the words "primarily liable to pay * * * by the provisions of this act." It must be assumed that plaintiff in error was familiar with these provisions of the law and provided for just such a primary liability as this when it executed the rider attached to the insurance contract. If, as seems to be argued by counsel for plaintiff in error, the provisions of section 28 were only intended to give to the applicant the common law or equitable right of subrogation, by which such employee would have no greater right than the employer and could not compel payment by the insurance company until the employer himself had made payments to the employee, then the right of the employee to compensation or to recover from the insurance company would be practically lost.

Such a construction would seem to make the provisions of section 28 as to the insurance company being primarily liable, meaningless. The court should construe this act reasonably, so that each part of it will be given effect, and the only way that it can be given effect is to construe it to mean that in case of the employer's insolvency the insurance company can be substituted and required to make the payments to the employee provided for by the act and to pay him as required by the act,—that is, in installments from week to week, when the employee is entitled to payments in that manner under the act. The insurance company in the rider attached to the policy assumed this responsibility and became liable in the same manner as the employer was liable under the act, and the act, therefore, in our judgment, became a part of the insurance company's contract liability, and all provisions of the original policy which conflicted with said agreement in the rider or with said Compensation act were practically set aside by said rider. By the provisions of sections 26 and 28 of the Workmen's Compensation act the legislature intended that in case of the employer's insolvency the insurance company should step into the shoes of the employer and make the payments as the employer would have made them under the act, and in case of such insolvency the insurance company should become "primarily liable" in the same manner that the employer would have been liable if solvent. It was not the intention of the act that in case of the employer's insolvency the insurance company's liability should be lessened or modified. Section 15 of the act provides that the Industrial Commission shall have jurisdiction over the operation and administration of the act. Section 31 of the act provides for recovery against the contractor, who is not the employer, who fails to require his sub-contractor, who is the employer, to insure his liability to pay the compensation provided in this act. This court has held that under this section the Industrial Commission had jurisdiction to make an award against the

contractor when the sub-contractor employer failed to furnish the insurance. (*Parker-Washington Co. v. Industrial Board*, 274 Ill. 498.) The legislature intended by this act to make provision for a speedy disposition and settlement of the claim of the injured employee. To accomplish that purpose the act should receive a liberal construction. The reasoning of this court in construing the provisions of section 29 of the act as to subrogation, in *Gones v. Fisher*, 286 Ill. 606, and cases there cited, strongly supports the giving of such liberal construction to the act in order to accomplish the legislative intention.

Counsel for plaintiff in error rely upon the rulings of the court in *Disourdi v. Maryland Casualty Co.* 14 British Columbia, 256, as tending to support their argument that this statute should not be so construed as to give the Industrial Commission jurisdiction over said company in this proceeding. The British Columbia act referred to in that case is worded so very differently from the act here under consideration that the opinion cannot be of great weight on the question of the jurisdiction of the Industrial Commission here. A case more nearly like the one here is that of *Craig v. Royal Ins. Co.* 8 B. W. C. C. 339, where the employer, who was insured, became bankrupt after he had made certain payments to the injured employee, and the workman made a claim before the proper tribunal for settlement of such claim against the trustee in bankruptcy, and on an attempt to settle certain disputed questions between the employer and the insurance company the court held that under the provisions of the British act a right was given to the workman to directly enforce the policy. The wording of the British act is perhaps more like the wording of section 31, which was construed in the *Parker-Washington case*, *supra*, than the language in section 28, but the intention, we think, is the same in all these provisions,—that is, to make the insurer or contractor, as the case may be, primarily liable under the provisions of the act. See Work-

men's Compensation acts,—Corpus Juris Treatise,—130, and authorities there cited.

Counsel for plaintiff in error further argue that by the release heretofore referred to, the insurance company is absolved from further liability, and that section 23 of the Workmen's Compensation act, which provides that an employee does not have the right to grant a release of a claim after an application has been made to the Industrial Commission for compensation, does not apply, because said section refers only to questions between employer and employee. What we have said on the question of jurisdiction applies here with the same force. If it was the intention of the legislature to bring the insurer under this act and make it or him primarily liable, under the circumstances shown here, in view of the fact that the company by the agreement in the rider attached to the policy accepted all of the provisions of the act, it would certainly be anomalous and unreasonable to hold that the protection of an employee should be guaranteed by the act as against an insurer the same as against an employer, but that the insurer could be released, regardless of section 23 of the act, while the employer could not be so released. The statute places the insurer in the place of the employer in certain respects, as we have held, and in our judgment it also places the insurer in the employer's place as to the release of the claim, and therefore this release does not control in this action.

It is also argued in this connection that the insurance contract between plaintiff in error and Edlund provides, among other things, that "no action for the indemnity provided by this contract shall be against the exchange, except for reimbursement of the amount of loss actually sustained and paid in money by the assured in full satisfaction," etc. Here, again, we think plaintiff in error is precluded by the agreement entered into by the rider attached to the insurance contract from raising this objection. By its agreement when it assumed the obligations provided for in the Work-

men's Compensation act it waived, in effect, this provision of its original contract. To permit the provision of the insurance contract to prevail over the provision of the statute would be to defeat the plain purpose of the act in a case of this kind. Plaintiff in error could not accept the premium charged for insurance against industrial accidents and yet make its own contract as to its liability and method of payment. The Industrial Commission had jurisdiction, under the rider contract, to enforce the payment of this claim against the insurance company if it was a proper claim, regardless of the provisions of the original insurance policy.

Plaintiff in error also argues that the dissolution of the partnership made the policy between it and Edlund and Dennison void. Plaintiff in error did not insist upon treating the contract at an end or ineffective by reason of such dissolution but by the attempted release it sought to be released from liability from the accident, and in the release itself it was stated it was to "cover only the case of Knut Hannibal," this being at a time when Edlund ran the business alone, and plaintiff in error manifestly knew that fact. Clearly, this would be treated as a waiver of any defense on account of the dissolution of the partnership. "Where there is a stipulation that a policy shall become void on the happening of some subsequent event and the insurer has notice that the event has occurred but does not cancel the policy, the provision is waived and the policy remains in force." (*Kelley v. People's Nat. Fire Ins. Co.* 262 Ill. 158.) The dissolution of a partnership does not necessarily render a policy void. *Allemania Fire Ins. Co. v. Peck*, 133 Ill. 220; see, also, 2 Joyce on Insurance, (2d ed.) sec. 2280.

Plaintiff in error having by the rider attached to the indemnity policy contracted to cover an accident under the Workmen's Compensation act, and as that act made plaintiff in error liable if the insured became bankrupt, in the light of what has been heretofore said we think the Indus-

trial Commission had jurisdiction as to the claim against plaintiff in error, and that the circuit court rightly held that there was a present obligation on the part of the plaintiff in error to pay the claim of the applicant, enforceable under the procedure of the Workmen's Compensation act.

The judgment of the circuit court is therefore affirmed.

Judgment affirmed.

(No. 12595.—Decree affirmed.)

GEORGE E. SVENSON, Appellant, *vs.* ANDREW HANSON *et al.*
Appellees.

Opinion filed October 27, 1919.

1. REAL PROPERTY—*section 5 of the Conveyances act authorizes creation of joint tenancies notwithstanding the amendment of 1917.* Section 5 of the Conveyances act of 1827, providing the manner in which an estate may be conveyed to grantees as joint tenants, did not repeal section 1 of the Joint Rights and Obligations act of 1821, abolishing joint tenancies, but only modified its application to real estate, and hence the amendment of 1917 to said section 1 did not re-enact that section as a new law inconsistent with section 5 of the Conveyances act. (*Mette v. Feligen*, 148 Ill. 357, followed.)

2. STATUTES—*repetition of old law in amendment is not enactment of new statute.* Where the legislature enacts an amendatory statute providing that a certain act shall be amended so as to read as repeated in the amendatory act, such portions of the old law as are repeated, either literally or substantially, in the new act are to be regarded as a continuation of the old law and not the enactment of a new statute.

3. SAME—*old law is retained in amendatory act as originally construed.* Where an amendatory act retains the same words and phraseology that were contained in the former law, which has been construed by the courts, it must be presumed that such law was retained in the amendatory act in view of the judicial construction already placed upon it.

APPEAL from the Superior Court of Cook county; the
Hon. CHARLES M. FOELL, Judge, presiding.

ANDERSON & ANDERSON, for appellant.

CHARLES L. BARTLETT, SHERMAN C. SPITZER, and
ROBERT HUMPHREY, for appellees.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

This is an appeal from a decree of the superior court dismissing for want of equity the appellant's bill praying partition of the following vacant and unimproved lands: Lot 59 and the south half of lot 60, in block 21, in Ravenswood Gardens, a subdivision of that part of the west half of the northeast quarter and the east half of the northwest quarter (except the right of way of the Northwestern Elevated railroad) of section 13, township 40, north, range 13, east of the third principal meridian, lying northeast of the right of way of the Sanitary District of Chicago, in Cook county, Illinois. The bill alleges that appellant is the owner of an undivided one-half interest in said lands and that appellees are the owners of the other one-half interest therein.

Appellant bases his claim on the provisions of section 1 of the Joint Rights and Obligations act, (Laws of 1917, p. 557,) alleging that estates in joint tenancy are thereby abolished. The sole question presented is one of statutory construction.

It appears from the bill that Gustaf E. and Ingeborg Svenson, parents of the appellant, were seized as joint tenants of the premises in controversy, deriving their title by warranty deed from Charles F. Powers and wife, dated July 1, 1918, in which the land was conveyed to them "not in tenancy in common but in joint tenancy;" that Gustaf E. Svenson departed this life intestate October 13, 1918, leaving him surviving Ingeborg Svenson, his widow, and appellant, his son and only heir-at-law; that October 14, 1918, Ingeborg Svenson, for a valuable consideration, conveyed the real estate in question to appellees, not in ten-

ancy in common but in joint tenancy, and thereafter departed this life intestate on October 16, 1918, leaving her surviving appellant, her son and only heir-at-law. The bill further alleges that by virtue of the act of June 26, 1917, which amends section 1 of the Joint Rights and Obligations act, (Hurd's Stat. 1917, chap. 76,) the right of survivorship in real estate as between joint tenants was abolished, and therefore that appellant, as heir of his father, is owner of an undivided one-half of said lands, and appellees, as grantees of his mother, are the owners of the other undivided one-half of said lands as tenants in common. This claim is based on the apparent conflict between that act as amended and section 5 of the act concerning conveyances, (Hurd's Stat. 1917, chap. 30,) which permits the creation of common law estates in joint tenancy in real estate by an express declaration in the deed to that effect.

Section 1 of the Joint Rights and Obligations act, which abolished joint tenancies, was originally enacted in 1821. It provided: "If partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivor or survivors but descend or pass by devise, and shall be subject to debts, dower, charges, etc., or transmissible to executors or administrators, and be considered to every intent and purpose, in the same view as if such deceased joint tenants had been tenants in common." (Rev. Stat. 1845, p. 299; Rev. Stat. 1874, p. 620.) By the amendment of June 26, 1917, the following was added to that section: "*Provided*, that when a deposit in any bank or trust company transacting business in this State has been made or shall hereafter be made in the names of two or more persons, payable to them, jointly or severally evidenced by a writing signed by them when the account is opened, such deposit or any part thereof or any interest or dividend thereon may be paid to any one of said persons, whether the other or others be living or not; when an agreement permitting such payment is signed by all said persons at

the time the account is opened or thereafter and the receipt or acquittance of the person so paid shall be valid and sufficient discharge from all parties to the bank for any payments so made." (Laws of 1917, p. 557.)

Section 5 of the Conveyances act was originally adopted in 1827 and has continued in our statute ever since. It provides: "No estate in joint tenancy, in any lands, tenements or hereditaments, shall be held or claimed under any grant, devise or conveyance whatsoever, heretofore or hereafter made, other than to executors and trustees, unless the premises therein mentioned shall expressly be thereby declared to pass, not in tenancy in common, but in joint tenancy; and every such estate, other than to executors or trustees, (unless otherwise expressly declared as aforesaid,) shall be deemed to be in tenancy in common." (Rev. Stat. 1845, p. 103; Rev. Stat. 1874, p. 273; Hurd's Stat. 1917, p. 659.)

Appellant insists that this section 5 was repealed by the amendatory act of June 26, 1917, for the reason that the two acts are inconsistent, and in such case the later act must prevail over the former. This contention is based upon the assumption that the act of 1821 was repealed by implication by the act of 1827, so that the re-enactment of section 1 of the act of 1821 with the proviso was the enactment of a new law inconsistent with section 5 of the Conveyances act, and, by implication, a repeal of said section. Appellees, on the other hand, insist the act of 1827 did not operate as a repeal of the former act but only modified the provisions of that act in so far as it affected real estate, and that the re-enactment in 1917 of section 1 of the Joint Rights and Obligations act with the proviso was not the enactment of a new law but only the continuance in force of the old law.

The history of the legislation on this subject was reviewed in *Mette v. Feltgen*, 148 Ill. 357, where it was held that the act of 1827 did not repeal the act of 1821 but only

modified it so as to permit the creation of estates in joint tenancy in real estate. It was there pointed out that in the Revised Statutes of 1845 section 2 of the act of 1821 appears as section 1 of chapter 56, entitled "Joint Rights and Obligations," and section 5 of the act of 1827 appears as section 5 of chapter 24, entitled "Conveyances," and that both chapters were approved on the same day; also that in the revision of 1874 section 2 of the act of 1821 again appears as section 1 of the Joint Rights and Obligations act, approved February 25, 1874, and section 5 of the act of 1827 appears as section 5 of the act concerning conveyances, approved March 29, 1872, and that both sections have now been on the statute books concurrently since 1827, and each twice included, without change of phraseology, in the general revisions of the statutes of this State. It was there further pointed out that prior to the revision of 1845 the statutory law on the subject was to be found in the act of 1821 as modified by the act of 1827, which latter act prevailed, and furnished the rule in all cases where the two acts were inconsistent with each other; also that the reenactment of these two statutes, without change, in the revision of 1845, and again in 1874, was a re-adoption of the statutory law on the subject in the same condition it was before any revision was made, and that the two statutes were to be construed the same as they would have been construed prior to the revision of 1845; that as a consequence the provisions of the act of 1827 must still be regarded as modifying the act of 1821 to the extent of permitting a grantor to create the common law estate of joint tenancy by expressly so declaring in the deed.

As further evidence of the fact that the legislature did not intend to forbid the creation of estates in joint tenancy it is well to note that provision has been made through all the revisions of our statutes for the partition of estates in joint tenancy. (Rev. Stat. 1845, chap. 79; Rev. Stat. 1874, chap. 106; Hurd's Stat. 1917, chap. 106.) It can

not be presumed that the legislature provided for the partition of an estate which it had declared could not exist.

There is no such conflict between the act of 1821 and the act of 1827 as would cause the former act to be repealed by the later act. By the two acts the legislature merely reverses the law applying to a joint conveyance of real estate. At common law a conveyance of real estate or a transfer of personal property to two or more persons without adding any qualifying words vested the title in such grantees or transferees as joint tenants, with the rights of survivorship. The act of 1821 abolished the common law estate of joint tenancy in real estate and abrogated its common law incident of right of survivorship in both real and personal property. This is now, and has been since 1821, the law of this State. A conveyance of real estate to two or more persons without adding any qualifying words vests the title to such real estate in the grantees as tenants in common and not as joint tenants. The act of 1827 did not purport to repeal the act of 1821, nor did the legislature by that act intend to restore the common law rule as to conveyances of real estate, so that a conveyance to two or more persons should vest the title in the grantees as joint tenants. By the act of 1827 a grantor was given the right to create an estate in joint tenancy with the common law incident of right of survivorship, provided the grantor clearly indicated this intention by using appropriate language therefor. The act of 1827 not only did not repeal the provisions of the act of 1821, but, on the contrary, expressly declared, with the provisions of the act of 1821, that every estate conveyed by deed should be deemed to be in tenancy in common, unless in the conveyance the premises therein mentioned should be expressly declared to pass not in tenancy in common but in joint tenancy.

Since the act of 1827 did not repeal the act of 1821 but only modified it in so far as it applied to real estate, the repetition of that part of the law as a part of the amenda-

tory act of June 26, 1917, was not the enactment of a new law on that subject but merely a continuation of the old law then in force, with the amendment added. The old law was re-enacted *verbatim* and the proviso added. It is a familiar rule, that when the legislature enacts an amendatory statute, providing that a certain act shall be amended so as to read as repeated in the amendatory act, and no change is made in the wording of the old act, such portions of the old law as are repeated, either literally or substantially, in the new act are to be regarded as a continuation of the old law and not the enactment of a new law on that subject. Hurd's Stat. 1917, chap. 131, sec. 2; *Merlo v. Coal and Mining Co.* 258 Ill. 328; *People v. Brunstrom*, 274 id. 62; *Spiehs v. Insull*, 278 id. 184.

It is elementary that where an amendatory act retains in a new law the same words and phraseology that were contained in a former law which has been construed by the courts, it must be presumed that such law was retained in the amendatory act in view of the judicial construction already placed upon it. The legislature is presumed to have known the construction previously placed upon such law and by its re-enactment to have intended that it should again have the same effect. (*Kirby v. Runals*, 140 Ill. 289; *Kelley v. Northern Trust Co.* 190 id. 401; *Daube v. Kuppenheimer*, 272 id. 350.) As these sections of the law were construed prior to the amendatory act of June 26, 1917, they permitted the creation of common law estates in joint tenancy in real estate where such intention was expressly declared in the deed creating the estate. (*Mette v. Feltgen*, *supra*; *Slater v. Gruger*, 165 Ill. 329; *Smith v. Henline*, 174 id. 184.) The holding in these cases is now the established doctrine in this State. (*Gaunt v. Stevens*, 241 Ill. 542.) The construction placed upon these two acts in *Mette v. Feltgen*, *supra*, is decisive of this case.

The decree of the superior court is therefore affirmed.

Decree affirmed.

(No. 12659.—Judgment reversed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in
Error, *vs.* FRANK GEISTER *et al.* Plaintiffs in Error.

Opinion filed October 27, 1919.

1. CRIMINAL LAW—*when entries made in course of business must be proved correct.* Where the party who makes entries in the due course of business is living and sane and is not permanently out of the State such entries must be proved by him to have been so made and that they are correct and true entries before they can be admitted in evidence between third parties as proof of the facts therein recited.

2. SAME—*what necessary to sustain allegation of ownership in carrier.* In an indictment for larceny, charging the theft of goods from a freight car during shipment, the allegation of ownership in the railroad company must be proved beyond a reasonable doubt by evidence either that the company owned the goods or was in the actual possession thereof.

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. HENRY GUERIN, Judge, presiding.

LYNN & HALLAM, and GEORGE A. OLIVER, for plaintiffs
in error.

EDWARD J. BRUNDAGE, Attorney General, MACLAY
HOYNE, State's Attorney, and FLOYD E. BRITTON, (ED-
WARD E. WILSON, and JUSTIN F. MCCARTHY, of counsel,) for the People.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

The plaintiffs in error, Frank Geister and Charles Jacobi, were jointly indicted with Anthony Rosetskis in four counts. The first count charged the larceny of three sewing machines, of the value of \$56 each, and fifty-two bolts of cloth, of the value of \$21.20 each, the personal goods and property of the Belt Railway Company of Chicago. The second count charged the buying, receiving and concealing of the said goods and chattels of the railway com-

pany knowing them to have been stolen. The third and fourth counts charged the burglary of a certain freight car of said railway company with intent to steal the personal goods, money and property of said corporation. Plaintiffs in error were tried jointly in the criminal court of Cook county, the other defendant not being tried. Geister was found guilty of larceny on the first count and the value of the property stolen was found to be \$103.50, and Jacobi was found guilty of receiving stolen property of the same value under the second count. Motions for new trial and in arrest of judgment were overruled and each defendant was sentenced to the penitentiary.

The Singer Sewing Machine Company on April 11, 1918, at South Bend, Indiana, loaded 140 of its sewing machines into freight car No. 75247 of the Wabash Railway Company for shipment to itself at Racine, Wisconsin, and sealed the car with its own seals. When the car arrived at Racine there were only 137 machines in it, the three missing being numbered G4483876, G4494308 and G5696460. The car was inspected by the inspector of the Wabash Railway Company at about eight o'clock P. M. of April 12, 1918, and the seals on the car were found intact on both sides of the car. The car then passed over the line of the Belt Railway Company, a transfer road running from South Chicago through Clearing, in Cook county, to West Chicago, and on inspection by an inspector on that line the seals were found intact at about 10:30 o'clock P. M. of April 13, 1918, at the east receiving yards on that line at Forty-eighth street, Chicago. The conductor on the Belt line that carried the car in question in a train of over forty cars, about midnight of April 13 saw the door of a box-car in his train open while at West Chicago and saw a crate of sewing machines in the car marked "Singer" but could not testify whether or not the car was sealed at the time he received it, and the evidence does not identify the car that he saw with an open door as Wabash car No. 75247.

It was proved by the entries in the book of the seal-taker of the Chicago and Northwestern Railway Company, without proof of the correctness of the entries therein, over the objections of the plaintiffs in error, that after that company received the car in question from the Belt line the seal on the east side of the car was broken when it was inspected on the receiving tracks of that company. Near one o'clock A. M. of April 14, 1918, two special police officers heard wood falling and the breaking of boxes along the side of the track of the Belt line at Fifty-ninth or Sixtieth street, Chicago, about two or three miles west of Clearing and east of the West Chicago station. It was a foggy morning, and they discovered three or four men at the place from which the noise came and about 150 feet from them, and called "Halt!" and began firing. Shots were returned and the men all ran away except one, Martin Petro, who had been shot in the back by the officers. He was carried to Englewood Hospital, where he died nine days later. The officers found at the place where he was shot, water buckets, tin pails, fifty-four pieces of kitchenware, fifty-two bolts of cloth, but no sewing machines. The officers could not identify any of the other men who ran away from the supposed stolen goods, none of which goods were shown to have been in or taken from Wabash car No. 75247 or from any other car of that train.

The evidence does not shed any more light than the above facts on the question of the point between South Bend, Indiana, and Racine, Wisconsin, where the missing sewing machines were taken from the car, if they were taken therefrom, or in what manner they were taken. There is no station on the Belt line between Clearing and West Chicago, and no proof in the record that the train that carried the sewing machines in question stopped between those stations. The evidence does not show that the Belt Railway Company was at any time the owner or in possession of the sewing machines or the car in which they were

shipped. It does positively show that the machines were owned by the Singer Sewing Machine Company, and that the Belt Railway Company at the time the car passed over that line was in the possession of and was being operated and controlled by the United States government, under William G. McAdoo, Director General.

It was error to admit the entry in the book of the seal-taker of the Chicago and Northwestern Railway Company. The party who made the entry is living and was only temporarily absent in one of the training camps of the government when the trial was had and was not present to prove that the entries were made in due course of his employment and that they were correctly made. It was proved that it was part of his regular duty as such seal-taker to make entries showing the condition of the seals on all cars passing under his inspection, but the witness so testifying never saw the entries made and positively testified that he did not know whether or not they were correct, and he, of course, did not know when they were made. Where the party who makes entries in the due course of business is living and sane and is not permanently out of the State, such entries must be proved by him to have been so made and that they are correct and true entries before they can be admitted in evidence, as between third parties, as proof of the facts therein recited. (2 Jones' Com. on Evidence, secs. 319, 320.)

No attempt was made to prove the ownership of any of the goods or property found where Martin Pietro was shot except by the bare facts already stated, and the same is true of the bolts of cloth described in the indictment. It was not shown that any of said goods were in the car with the missing sewing machines or had ever been in any car on the Belt line or that any of them had ever been stolen, except by the alleged confessions of Frank Geister hereinafter related. There could therefore be no conviction of either of plaintiffs in error in this case as to such prop-

erty, and there is no such claim by the State. It was incumbent on the State to prove, beyond a reasonable doubt, that the Belt Railway Company owned or was in the actual possession of the sewing machines in question to sustain the charge of ownership in that carrier as alleged in the indictment. (*Aldrich v. People*, 225 Ill. 610.) The People failed to make that proof and the judgment of conviction cannot stand as against either of the plaintiffs in error.

The testimony of three witnesses was offered to convict plaintiff in error Jacobi, the first of whom testified that he saw two men coming out of a shed on Fifty-fourth street, Chicago, on the night of June 21 or 22, 1918, with a sewing machine and walk rapidly down the street to an automobile standing in front of Frank Geister's home, about 700 feet from the shed, and place the machine in the rear of the automobile; that they then turned the machine around and drove west on Fifty-fourth street; that he tried to follow them but they put out the lights on the automobile; that he then went to the shed, which stood about 100 feet from the street and which was fenced with a wire fence, and in it found a bed, a wheelbarrow, a couple of shovels and a sewing machine wrapped in rags, with the number of the machine covered with paint. This latter sewing machine was produced in court as an exhibit, and was a Singer sewing machine numbered S8850043. The evidence showed that the number on the machine had been changed, but no evidence was offered to show that this machine was one of the machines shipped to Racine and found missing on the arrival of the car of machines. The record does not disclose the make or character of the sewing machine taken away by the automobile. The second witness against Jacobi testified that he was a professional gambler and a chauffeur and did most anything; that one time,—he could not give the year or month but thought it was "after July 4" but was not sure,—Jacobi left notice with a barber in Cicero, where witness lived, that he wanted to see him; that he

went to Jacobi's house about eight o'clock one evening and Jacobi told him to come back later, after dark; that he accordingly went back between nine and ten o'clock; that Jacobi hired him to take away a sewing machine, saying he would pay him "for the gas for hauling it;" that he took the job and hauled the machine to the north side with his automobile; that Jacobi rode ahead of him on a motorcycle; that they got the machine out of a shed near Jacobi's home, on Seventy-second street and some other street that he could not remember. He further testified that he had had his automobile about a year and a half but could not remember when he sold it, and that he never rode with Jacobi before that time. The record does not disclose who owned or was in possession of the shed. There is no evidence to identify this machine so taken from the shed, if it was so taken, as one of the machines alleged to have been stolen, and there was no evidence as to how it came to be in the shed or who claimed to be the owner of the shed. The third witness, Charley Pietro, testified that after Martin Pietro's death he was in his brother's home and saw the plaintiff in error Jacobi there fixing a yellow sewing machine,—putting parts of the machine together which he was taking out of a set.

Jacobi denied all knowledge or connection with the theft of the sewing machines or of ever having one in his possession at the shed in question or of ever having taken one from that shed, and denied fixing a sewing machine at Mrs. Pietro's or of ever having worked at fixing sewing machines, and denied *in toto* the evidence of the witness who testified that Jacobi hired him to haul a sewing machine from that shed. The evidence is entirely insufficient to convict Jacobi of having in his possession the stolen machines, or any one of them, knowing them to be stolen, as it fails to establish beyond all reasonable doubt that he had any one of the stolen machines in his possession or that the machine claimed to have been taken by him and

the chauffeur from the shed was one of the stolen machines in question, and for the further reason that the ownership of the machines alleged to have been stolen was not proved as alleged in the indictment.

On Sunday morning, April 14, 1918, Mrs. Mary Pietro went to Frank Geister's home and requested him to go to the home of her brother-in-law, Stephen Ruika, and see why her husband, Martin Pietro, had not come home. He asked her why Charley Pietro (Martin's brother) could not go, and she told him he had gone to Cicero the day before and had not come home. Charley Pietro lived at Martin Pietro's, and on Saturday afternoon of April 13, 1918, near the same hour, both left their home and neither of them had returned. Geister went to Ruika's house, about six miles away, as requested by Mrs. Pietro, after inquiring the way, and later reported that Mrs. Ruika had informed him that Martin had been there the night before but left about eleven o'clock. Five detectives went to Martin Pietro's house just after Geister had gone to Ruika's and searched the house, and told Mrs. Pietro, through Charles Jacobi, whom Mrs. Pietro had sent for to act as interpreter, that her husband had been shot. She then went to the hospital where her husband was, and asked Mrs. Geister to go with her.

The State relied on six Lithuanians,—James Ruika, Stephen Ruika and his wife, Bessie, who is a sister of Martin and Charley Pietro, Sophia Ruika, sister of Stephen and James Ruika, Mrs. Sophia Miller, mother of James and Stephen Ruika, and Charley Pietro,—all of whom testified through an interpreter, for the conviction of Geister. The substance of James Ruika's testimony is that all six of them met at Martin Pietro's on Sunday afternoon, April 14, 1918, and that Geister and his wife and Mrs. Pietro were there also; that Geister stayed only ten or fifteen minutes and simply detailed what he claimed happened at the time Martin Pietro got shot; that he said he was tired out,

working; "that they were out on the tracks and they hauled one load home and went over for the second load and Martin Pietro was shot while on the railroad tracks; that he didn't know what had happened; that he left them there, and also said something about some sewing machines." He also testified that he had some talk with Geister as they were coming from the hospital where Martin was, and that Geister said: "Between you and me, I will tell you they have all kinds of dishware, clothes, and all other things. Some Singer sewing machines are at home, and some are hidden somewhere in the ditch and in the fields. Never mind; I will hire about five or six witnesses and that will be all right." Stephen Ruika and his wife, Bessie, both repeatedly stated in their testimony that it was not Geister that did the talking at Mrs. Pietro's but Mrs. Geister. Mrs. Miller testified positively that it was Mrs. Geister and not Geister that did the talking at Mrs. Pietro's. Charley Pietro in a way corroborates James Ruika in his testimony that Geister made the statement at Mrs. Pietro's testified to by Ruika, but in answer to the question, "Did Geister say anything about what happened the night before?" his answer was, "Geister's wife was talking about it." We are strongly impressed with the belief that if any talking at all was done at Mrs. Pietro's that Sunday evening it was done by Mrs. Geister and not by Geister, as she was the one that had just come from the hospital. The attorney for the State, however, persisted repeatedly, over the defendants' objections, in asking these witnesses to state what Frank Geister said on that occasion, after some of them had positively and repeatedly informed him that it was Mrs. Geister and not Geister that did the talking, and by his persistence caused them later to say, by misunderstanding or through fear, that Geister did the talking. Mrs. Geister was an incompetent witness. Mrs. Pietro testified positively that Geister did not do any such talking at her house that afternoon. Geister denied it, and denied utterly

any connection with or knowledge of the theft and all conversations attributed to him tending to show he was present or with Martin Pietro when shot. The evidence proved that he was a stockholder and director of the Metropolitan State Bank and a carpenter and builder, and had a good reputation for truth and veracity, honesty and fair dealing. He also proved by himself and two other witnesses that he was at home on the Saturday night in question at nine o'clock P. M. and until one o'clock A. M. the next morning.

It was proved, without any attempt at denial, that five detectives took Mrs. Martin Pietro to one of their offices in Clearing. While otherwise unaccompanied they importuned her to tell them something about Geister and the sewing machines, and said they were going to put him in the penitentiary for ten years. They threatened to jail her if she did not tell the truth, and told her that she must tell about Geister because he was with her husband that night. Although she repeatedly told them that she knew nothing, they continued to threaten her and offered to get money from the company for her if she would help them in the case. The detectives also arrested Geister on June 21, 1918, and charged him with stealing the sewing machines and named the Ruikas as his accusers. They put him in jail and refused him all opportunity to consult an attorney or to give bond or to have a hearing before the justice. They sought to induce him to confess by employing all manner of threats and brutal actions toward him and his family. They carried him to his own house, searched his premises, opened up all the drawers and private places in his house and turned their contents upside down, took away a watch, a bracelet and a breast pin belonging to his wife, struck his brother-in-law over the head with a revolver when he attempted to call the city police, held his wife by the arm and told her to shut up or they would shoot her like a dog, but nevertheless they got no information of any character that in any way connected Geister with the crime. The

indictment in the case was indorsed by but one witness, Foster, one of the so-called detectives, and he never testified at all. When the witnesses for the State were called to be sworn the court overruled plaintiffs in error's objection to their testifying on the ground that their names were not indorsed on the indictment and that no notice had been given the defendants that such witnesses would be called against them previous to their being sworn. The court gave them a short time to interview the witnesses, which had to be done largely by an interpreter.

There is another reason for discrediting the testimony of the six Lithuanians aforesaid. Sophia Ruika and Charley Pietro undertook to collect claims against Martin Pietro or his wife before his death and even after he was shot. Mrs. Ruika insisted on her paying \$100. Charley Pietro first claimed \$600 from her, and later \$900. They tried to collect these claims by threats both before and after Martin Pietro died, and having failed to get the claims paid or to get the house and lot Martin owned, Charley Pietro offered to marry his brother's widow in less than a week after her husband died, and asked Geister to advise the widow to marry him. When Geister admonished him that it was not a decent time in which to marry or to propose marriage and that he could not take the property away from the widow and her surviving child, he beat up the widow and left the place and threatened that he would fix Geister, who he said was advising the widow against his interest. He also collected \$36 owed to Martin Pietro for wages from his employer before Martin's death and without notice to him or Mrs. Pietro. The evidence clearly shows that the whole Ruika family were incensed at Geister because of his advising the widow against paying Bessie and Charley their claim or because they supposed he had done so. All the Ruika family refused to attend Martin's funeral or to send any flowers because the funeral was at Geister's house. It was held there by request of Mrs. Pie-

tro, because the undertaker had informed her that he could not get to her house with the hearse on account of the wet and muddy streets, there being no pavement extending to her house. Bitter malice of this character knows and recognizes no bounds when it is employed against the persons against whom the same is entertained. There were many more reasons for supposing Charley Pietro and some of the Ruikas were the parties who accompanied Martin Pietro to the place where he was shot than for supposing Geister and Jacobi were with him, if the evidence of the Ruikas and Charley Pietro be eliminated. The evidence is undisputed that Geister did not know and had never seen either Stephen Ruika or his wife before he went to their house to inquire for Martin Pietro, and it is very unusual for any man to make such confessions voluntarily to strangers or in their presence as are attributed to Geister in this record. Bessie Ruika testified that when Geister came to her house on that Sunday he told her that if anybody asked her about Martin Pietro she should say that Martin came to her house about six o'clock on Saturday evening and went away about eleven P. M. so drunk he could not find his way home and got lost. She was positively contradicted in this statement by Geister. She was also contradicted by Mrs. Pietro and Rose Elderman, the latter being an entirely disinterested witness, in another matter. Both these witnesses affirmed, and Bessie Ruika denied, that she (Bessie) said at the hospital the day Martin Pietro died, that it was her fault Martin got shot; that she was sorry she did not keep him at her house that Saturday night; that "they had been drinking" at her house and that she let him go home about eleven o'clock.

For the reasons aforesaid the judgment is reversed as to both plaintiffs in error. As the evidence positively shows the ownership of the sewing machines as laid in the indictment was not and cannot be proved, the cause will not be remanded.

Judgment reversed.

(No. 12630.—Judgment affirmed.)

CARL BUSHNELL, Appellant, vs. HOMER H. COOPER, Admr.
Appellee.

Opinion filed October 27, 1919.

1. **DIVORCE**—*suit for divorce is of a personal nature.* Marriage is a personal relation or status created under the sanction of law, and an action for divorce is a proceeding of a personal nature brought for the purpose of effecting a dissolution of that relation.

2. **SAME**—*death of either party abates suit.* In the absence of a statute to the contrary, the death, before final decree, of either party to a divorce proceeding abates the action, for the reason that death has settled the question of separation beyond all controversy and has deprived the court of jurisdiction both over the person and the subject matter.

3. **SEPARATE MAINTENANCE**—*dissolution of the marriage relation extinguishes subject matter of suit.* While an action for separate maintenance differs from a divorce proceeding in that the latter is for the dissolution of the marriage relation while the former is in affirmance of it and to enforce its obligations, the marriage relation constitutes the foundation of the action in each case and the dissolution of that relation extinguishes the subject matter of the suit.

4. **SAME**—*alimony pendente lite and solicitor's fees are incidental to the action.* The allowance of alimony *pendente lite* and of a reasonable amount as solicitor's fees in a suit for separate maintenance is merely incidental to the main action, and as they are allowed only in furtherance of the action they cannot be recovered in an independent suit.

5. **SAME**—*when death of complainant cannot be made basis of bill to review decree.* Although a petition to file a bill of review is the proper remedy to bring matters *aliunde* to the attention of the court after the term has passed, the fact of the death of complainant on the day a decree for separate maintenance is entered cannot be made the basis for a bill of review by the defendant, who knew of the death and had ample time to inform the court thereof by proper motion before the expiration of the term at which the decree was rendered.

6. **BILLS OF REVIEW**—*when bills of review may be allowed.* The function of bills of review is to prevent a miscarriage of justice, and they will be allowed only in furtherance of that object for error

apparent on the face of the record, to impeach a decree for fraud or to review a decree on account of new matter or newly discovered evidence.

7. *SAME—bill of review for newly discovered matters rests in discretion of court.* A bill of review on account of newly discovered matters cannot be filed as a matter of right but is only allowed in the discretion of the court, and where it appears affirmatively that the alleged newly discovered matters came to the party's knowledge in ample time to have been availed of in the original cause such matters cannot be made the basis of a bill of review.

8. *SAME—what is essential to bill of review for newly discovered evidence.* A bill of review for newly discovered evidence will not lie until after the close of the term at which the decree was entered, and there must be a showing that such evidence was not discovered until after the original decree had been entered and by the exercise of reasonable diligence could not have been discovered before that time.

9. *SOLICITORS' FEES—when hearing before master on question of fees is improper.* In an action for separate maintenance, where the court has heard the case and is able to determine a reasonable amount for solicitor's fees a reference of such question to the master is unnecessary, and the taking of five hundred pages of testimony on the question is improper; but the party who obtained such reference cannot afterwards take advantage of the improper practice on a bill to review the decree.

10. *PRACTICE—when a decree may be amended.* A term of court is regarded as but a single day or unit of time and all acts done within that term are regarded as contemporaneous, and during the term at which a decree is entered it may be amended or set aside as justice may require, but after the term has expired it cannot be altered or amended except in the manner pointed out by statute or by a bill of review.

APPEAL from the First Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding.

NORMAN K. ANDERSON, and BENJAMIN CLARKE, for appellant.

S. C. IRVING, (DANIEL RILEY McMASTER, of counsel,) for appellee.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

March 6, 1917, appellant filed his petition in the superior court for leave to file a bill of review to set aside a decree entered by that court June 9, 1916, granting to appellant's wife, cross-complainant in the original case, separate maintenance, fixing alimony and solicitor's fees and taxing costs against appellant. It is sought to set aside the decree because at the time it was entered the cross-complainant was dead. On the hearing the court denied the petition and refused to permit the bill to be filed. On appeal to the Appellate Court for the First District the decree of the lower court was affirmed. A certificate of importance was granted and this appeal prosecuted.

It appears from the pleadings and the proofs heard on the application for leave to file the bill, that February 28, 1914, appellant filed his bill for divorce in the superior court, charging Mary Bushnell, his wife, with desertion; that she answered and filed a cross-bill charging infidelity and cruelty, and prayed for separate maintenance and support for herself and minor son. The cause came on for hearing before one of the judges of the superior court on November 17, 1915, and the following day the court announced that the equities of the case were with the cross-complainant, and that a decree would be entered dismissing the original bill for want of equity and granting to cross-complainant the relief asked in her cross-bill, with alimony at the rate of \$100 a month for herself and \$20 a month for the support of her minor child, and directed her solicitor to prepare a decree in conformity with such finding. Thereafter a decree of separate maintenance was prepared and submitted to the court December 3, 1915. At this time counsel for Mary Bushnell asked for an order fixing the amount of her reasonable solicitor's fees. The parties were unable to agree upon the amount and the matter came on

for hearing before the court December 8, 1915. A partial hearing was had, and over the protest of counsel for Mary Bushnell an order was entered referring the matter to a master in chancery to take proof upon that question. A hearing was had before the master, some 500 pages of testimony were taken, and May 23, 1916, a finding and recommendation made that the cross-complainant be allowed \$1500 as her reasonable solicitor's fees, together with something like \$175 advanced by her as master's fees. June 9, 1916, exceptions filed to the master's report were heard and overruled and the report was approved and confirmed. A decree was entered dismissing the original bill for want of equity and finding the facts substantially as set forth in the cross-bill. Mary Bushnell was granted a decree of separate maintenance, with an allowance of \$1200 a year from December 1, 1915, for her support and \$240 a year for the support of her minor child, together with the household goods at 4141 Lowell avenue, Chicago, her solicitor's fees of \$1500 and the master's fees of \$175 advanced by her. The decree directed the payment of these sums, together with court costs and stenographer's fees, and made the same a lien upon the real estate of appellant.

The hearing on the exceptions to the master's report was taken up about 2:15 o'clock on the afternoon of June 9, 1916, and concluded about four o'clock that afternoon. Mary Bushnell was then residing at Norwood, Ohio, and was reported by her attorney to be in a very serious condition of health. It later developed that she died about two o'clock that afternoon. At the time the hearing was had and the decree entered her death was not known to any of the solicitors in the case nor to the court. Knowledge of Mrs. Bushnell's death came to the appellant on the evening of June 9,—the day the decree was entered,—but he took no steps to bring such fact to the court's attention at that time nor at any time until after the expiration of the term at which the decree was entered. July 15, 1916, ap-

pellant presented his petition for leave to file a bill of review. The petition set forth the fact of Mrs. Bushnell's death, as above stated, and alleged that the court was without jurisdiction to enter the decree. No further steps, however, were taken until in the fall of 1916, when solicitors for appellant asked leave to withdraw the petition filed in the original case and to begin such proceedings as an independent action. The motion was allowed and leave granted to withdraw the petition without prejudice. This was done, and, as hereinbefore stated, the present action commenced March 6, 1917.

The questions presented are, whether or not the court had jurisdiction to enter a decree in the original action after the death of one of the parties, and the method by which such a decree may be reviewed when the fact of such death does not appear on the face of the record.

Marriage is a personal relation or status created under the sanction of law, and an action for divorce is a proceeding brought for the purpose of effecting a dissolution of that relation. The action is one of a personal nature. In the absence of a statute to the contrary the death of one of the parties to such action abates the action, for the reason that death has settled the question of separation beyond all controversy and deprived the court of jurisdiction, both over the persons of the parties to the action and of the subject matter of the action itself. For this reason the courts are almost unanimous in holding that the death of either party to a divorce proceeding, before final decree, abates the action. 1 *Corpus Juris*, 208; *Wren v. Moss*, 2 Gilm. 72; *Danforth v. Danforth*, 111 Ill. 236; *Matter of Crandall*, 196 N. Y. 127; *Wilson v. Wilson*, 73 Mich. 620; *Strickland v. Strickland*, 80 Ark. 452; *McCurley v. McCurley*, 60 Md. 185; *Begbie v. Begbie*, 128 Cal. 155.

While the present action is one for separate maintenance and differs from a divorce proceeding in that the latter is one for the dissolution of the marriage relation while the

former is one in affirmance of it and to enforce the obligations of that relation, they are both, nevertheless, similar in their nature, as the marriage relation constitutes the foundation of the action in each case and the dissolution of that relation extinguishes the subject matter which forms the basis for such an action. Under our statute a proceeding for separate maintenance may be had in a court of equity, and by such proceeding a wife may secure her reasonable support and maintenance while she lives, or has lived, separate and apart from her husband without her fault. Alimony and solicitor's fees may be allowed the same as in divorce proceedings. The allowance of alimony *pendente lite* and of a reasonable amount as solicitor's fees to prosecute the suit is merely incidental to the main action. They are allowed only in furtherance of it and cannot be recovered in an independent suit. *Dow v. Eyster*, 79 Ill. 254.

Appellee insists that a bill of review is not the proper remedy for bringing such facts *aliunde* before the court, and that it will not lie for matters merely in abatement of the action or as a substitute for a writ of error or an appeal. In *Tosetti Brewing Co. v. Koehler*, 200 Ill. 369, we held that where the error did not appear on the face of the record the proper method of impeaching and setting aside a decree after the term had expired was by a bill of review to bring the matter before the court, so that the decree might be modified and corrected according to the equities of the case. If this were not the rule a party would be without remedy where the fact of death of one of the parties was not discovered until after the decree was entered and the term passed. In our opinion the remedy pursued was the proper one to bring such matters *aliunde* to the attention of the court after the term had passed.

Bills of review, or bills in the nature of bills of review, are divided into three general classes: Bills for error apparent on the face of the record, bills to impeach a decree for fraud, and bills to review a decree on account of

new matter or newly discovered evidence. Bills of the last class cannot be filed as a matter of right but are only allowed in the sound discretion of the court; and the same rule obtains where a bill for either of the first two causes is joined with one to review a decree on account of new matter arising since the decree was entered. (*Schaefer v. Wunderle*, 154 Ill. 577; *Cole v. Littledale*, 164 id. 630; *Elzas v. Elzas*, 183 id. 132; *Harrigan v. County of Peoria*, 262 id. 36.) Bills of this character will not lie until after the close of the term at which the decree was entered, and when based upon newly discovered matter must be accompanied by a showing that such fact was not discovered until after the original decree had been entered and by the exercise of reasonable diligence could not have been discovered before that time. (*Griggs v. Gear*, 3 Gilm. 2; *Schaefer v. Wunderle*, *supra*; *Elzas v. Elzas*, 183 Ill. 160; *Watts v. Rice*, 192 id. 123; *Harrigan v. County of Peoria*, *supra*.) Their function is to prevent a miscarriage of justice, and they will be allowed only in furtherance of that object. *Hopkins v. Hebard*, 235 U. S. 287.

In the case before us no showing was made of any fraud practiced upon the court, and appellant's right to relief rests solely upon the fact that knowledge of the death of Mary Bushnell came to him on the evening of the day the decree was rendered. The claim made does not go to the merits of the controversy, which had been fully heard and considered and substantially disposed of long before her death. The delay in entering the written decree was due largely, if not entirely, to the unnecessary reference to the master. Five hundred pages of testimony were taken by the master on the question of fees. Such practice can not be approved. This reference was made over the protest of counsel for Mary Bushnell, who urged the court to fix the fee. The court had heard the case and could easily have determined a reasonable fee. Appellant desired the reference and ought not benefit by his own request. The

only effect permission to file the bill could have would be to relieve appellant from an obligation he is otherwise legally and equitably bound to pay. He bases his right to file the bill solely upon the circumstance of the death of Mary Bushnell, cross-complainant in the divorce proceeding, on the day the decree for separate maintenance was rendered, and seeks relief on a technicality entirely too refined to commend itself favorably to a court of equity, which ordinarily does not concern itself with fractional parts of a day. (*Levy v. Chicago Nat. Bank*, 158 Ill. 88.) It affirmatively appears from his petition that he learned of Mary Bushnell's death, and of the hour of her death, about nine o'clock on the evening of June 9, 1916, and that he took no steps to bring such fact to the attention of the court until after the term had expired. In law a term of court is regarded as but a single day or unit of time, and all acts done within that term are regarded as contemporaneous. During the term at which a decree is entered the record remains in the breast of the court, and the decree may be amended or set aside as justice or right may require, (*Krieger v. Krieger*, 221 Ill. 479; *People v. Wells*, 255 id. 450;) but after the term has expired it cannot be altered or amended except in the manner pointed out by the statute or by a bill of review. (*Mooney v. Valentynovicz*, 255 Ill. 118.) No satisfactory reason is shown why the fact of Mary Bushnell's death was not brought to the attention of the court at an earlier date. Had the proper motion been made at the June term, the court, undoubtedly, would have granted appellant ample time to present the facts to support it. No such motion was made and appellant slept on his rights until that term expired. The failure to make such motion was due entirely to his own negligence, and under such circumstances such new matter cannot be made the basis for a bill of review. (*Schaefer v. Wunderle*, *supra*.) Where it affirmatively appears that the matters relied upon as newly discovered came to the party's knowledge in ample

time to have been availed of in the original cause, by motion or otherwise, they cannot be made the basis for a bill of review to set aside the decree. (*Griggs v. Gear, supra; Boyden v. Reed*, 55 Ill. 458; *Harrigan v. County of Peoria, supra.*) Such is the situation presented by this case, and the court was right in denying leave to file the bill.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(No. 12344.—Reversed and remanded.)

THURLOW H. PRATT, Admr. Appellee, *vs.* LUCY WING SKIFF *et al.*—(THE WOMAN'S BOARD OF MISSIONS OF THE INTERIOR, Appellant.)

Opinion filed October 27, 1919.

1. *WILLS—codicil must be construed with will.* The purpose of a codicil is to alter, enlarge or restrain or to explain, confirm and re-publish the provisions of the will, and the codicil does not supersede the will but is a part of it and is to be construed with it as one entire instrument.

2. *SAME—power of disposition is not larger than estate devised unless clearly indicated.* Where a power of disposal accompanies a bequest or devise of a life estate the power of disposal is only co-extensive with the estate which the devisee takes under the will, and means such disposal as a tenant for life could make unless there are other words clearly indicating that a larger power was intended.

3. *SAME—remainder may be limited after life estate in personal property.* A testator may bequeath a life estate in personal property to another and limit a remainder after it.

4. *SAME—life estate in money requires security from life legatee.* Where a life legacy consists of money, courts of chancery require security from the life legatee although he is a responsible party and there is no showing that there is danger of the money being wasted, and the money will not be paid to the life tenant without security unless the will clearly discloses that such was the testator's expressed intent.

CARTWRIGHT and THOMPSON, JJ., dissenting.

APPEAL from the Circuit Court of Morgan county; the Hon. NORMAN L. JONES, Judge, presiding.

WORTHINGTON, REEVE & GREEN, for appellant.

WILSON & BUTLER, for appellee.

JULIAN P. LIPPINCOTT, for Daisy Emrich Charlesworth.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

Thurlow H. Pratt, administrator with the will annexed of the estate of Addie Wing Williams, deceased, filed a bill in chancery to the April term, 1918, of the Morgan county circuit court against the heirs, devisees and legatees of the testatrix for the purpose of obtaining a construction of her will.

The testatrix, Addie Wing Williams, died December 3, 1916, leaving as her only heirs-at-law her sisters, Lucy Wing Skiff and Nellie Wing Hemenway; her nephews, Jewett F. Wing and Harold E. Wing, and her niece, Edith M. Wing. She also left surviving her Daisy Emrich Charlesworth, a foster-daughter, whom she and her husband had taken at the age of ten or twelve years and who lived with her at her death. They had talked of adopting her but had never done so. The testatrix died seized of her homestead in Jacksonville, Illinois, and also a house and lot in Chapin, Illinois, worth about \$2000. She left household goods of the value of about \$120, and notes, mortgages and other assets of the value of \$17,800. The will was dated March 31, 1915. She first gives and bequeaths, after the payment of her debts, funeral expenses and other expenses, the following legacies to her cousins: To Arthur Ames Woodward the sum of \$3000; to Nellie Bean Woodward, Stella Bean, Emma Bean and Nellie Wing Lewis, \$1000 each; to Abbie S. Wing \$1000, to be given at her death to the Congregational (Vermont) Home

Missionary Society, to be applied to the endowment fund of said society. To Elizabeth Meyers she bequeathed the sum of \$300; to the Woman's Board of Missions of the Interior, (Congregational,) incorporated under the laws of Illinois, \$1000, to be used as an endowment fund for foreign missions; to the Deaconess Home in Pana, Illinois, \$500, to be used by the Congregational trustees of the home for the deaconesses in Pana; to the trustees of Concord, Illinois, cemetery \$100 in trust, the interest on said sum to be used to care for "the Williams lot in said cemetery;" \$50 "in trust by the trustees," the interest of said sum to be used to keep up the J. F. Wing lot in the Bridgeport, Vermont, cemetery; to Thorsby Institute \$300 for a piano. The devise and bequests to Daisy Emrich Charlesworth are in the following language: "I give and bequeath to my adopted daughter, Daisy Emrich Charlesworth, the sum of three thousand dollars (\$3000); the house and lot No. 238 Westminster street, Jacksonville, Illinois, and the furniture in the house, after my sisters, Nellie Wing Hemenway and Lucy Wing Skiff, have taken what they want. I give and bequeath my piano to Daisy Emrich Charlesworth."

On August 30, 1915, the testatrix executed her second codicil to her will, which she called codicil No. 3, and it reads thus: "The property which I have given to my daughter, Daisy Emrich Charlesworth, three thousand dollars (\$3000); the home and lot on 238 Westminster street, Jacksonville, Illinois; the piano; the household goods that my sisters, Lucy Wing Skiff and Nellie Wing Hemenway, do not want, to be used by the said Daisy for her lifetime. Should she leave the whole or part of this property, I want it given at her death, one-half to the Woman's Board of Missions of the Interior as an endowment fund under the laws of the State of Illinois, the interest to be used for foreign missions; the last half to be given as an endowment fund to the American Missionary Association, office 287 Fourth avenue, New York, for the education of the

whites in the South. Give my piano to the free kindergarten in Jacksonville, Illinois."

The paragraph of the will in behalf of Lucy Wing Skiff is in this language: "I give to my sisters, Lucy Wing Skiff and Nellie Wing Hemenway, my clothes, watch and jewelry, the rest of my estate to be equally divided between my sisters, Lucy Wing Skiff, Nellie Wing Hemenway, and my brother Charles Lyman Wing's children, Edith M. Wing, Jewett F. Wing, Harold D. Wing. The sum given to Jewett F. Wing, the use of the sum for his lifetime, the income to be his to use as he wishes, then at his death to be given to his nearest relatives. (The amount of money that my sister Lucy Wing Skiff receives shall be used in trust, at her death it will be given to my nearest relatives, my nephews and nieces.)"

On August 16, 1915, the testatrix executed the first codicil to her will, which she called the second codicil, and it reads thus: "The part of my property or estate which I have given to my sister Lucy Wing Skiff I would like to be left by her after she has had the use of it her lifetime to an endowment fund for missions instead of being given to my nearest relatives, as written in my will. The sum of fifteen hundred dollars (\$1500) to be given as an endowment fund to the Congregational Woman's Board of Missions of the Interior, under the laws of the State of Illinois. The rest of the given sum, fifteen hundred dollars (\$1500) more or less, to the Congregational Board of Ministerial Relief, to be used as an endowment fund, office 287 Fourth ave., New York, N. Y."

Appellant answered the bill, practically admitting all its averments, except that it denied that the provisions of the will and the codicils were uncertain and indefinite; averred that the purpose thereof was to devise and bequeath to Daisy Emrich Charlesworth only a life estate in the \$3000 and the house and lot in Jacksonville, with remainder over, one-half thereof to appellant; avers that it is the owner

in fee of one-half of said property in trust for the uses and purposes declared in the will and codicils, subject to said life estate. By way of cross-bill appellant prays that the court will by its decree so find and establish the meaning of said will, and that the life tenant, Mrs. Charlesworth, may be required, as a condition to her receiving from the administrator the property in which she has a life interest, to give bond, with good and sufficient sureties, to appellant by way of assurance that the sum so bequeathed to her for life shall without loss be ready to be paid to appellant at the time it shall be entitled to receive the same, or that such other provision may be made by the decree of the court as will sufficiently give such assurance. Appellant answers, in substance, the same as to the legacies bequeathed to Lucy Wing Skiff, and by way of cross-bill prays similar relief.

The court found that under the original will the bequests and the devise to Daisy Emrich Charlesworth were absolute and in fee simple; that by the provisions of codicil No. 3 the estate was reduced to a life estate, with full power to dispose of all of the property during her life, with remainder over in one-half thereof from her death to the Woman's Board of Missions of the Interior, to be held as an endowment fund, the interest thereof to be used for foreign missions, and with remainder over in the other half to the American Missionary Society. The court decreed that the administrator pay to her said bequest of \$3000, to deliver her the remainder of the household goods which testatrix's sisters do not want, and to deliver her the piano, to be used by her for life, with full power of disposition of said property during her life, with remainder over in one-half of what should remain, to appellant, etc. The court by its decree construed the will and codicil No. 3 to vest the life estate in the homestead property in Daisy Emrich Charlesworth, with full power of disposition during life, with remainder over at her death to appellant in one-half

thereof, or if sold, in the proceeds thereof or what shall remain of such proceeds, to be held as an endowment fund, etc. Appellant alone prosecutes this appeal from that decree. The decree as to the property bequeathed to Lucy Wing Skiff was in accordance with the prayer of appellant in its cross-complaint, and all parties abided by that decree. The provisions of the will and codicil No. 2 with reference to that property are not material in the consideration of this appeal, except in so far as they may affect the interpretation of those parts of the will in dispute.

The only question on this appeal is as to whether or not the circuit court properly interpreted the will and the second codicil, numbered 3 by the testatrix, as to the devise and bequest to Daisy Emrich Charlesworth. Appellant contends that by the terms of the codicil there is an express limitation of an estate for life to Mrs. Charlesworth, and that she is not given thereby the absolute power of disposition of the same but is to only have such use of the property as is consistent with that of a life owner. The original will itself clearly vested her with the absolute title in fee to the real estate and the absolute ownership of the personal property. The codicil in express terms limits her interest in all the property to a life estate. The purpose of a codicil is to alter, enlarge or restrain the provisions of the will, or to explain, confirm and re-publish it. It does not supersede the will but is a part of it and is to be construed with it as one entire instrument. *Grimball v. Patton*, 70 Ala. 626.

It is contended by appellee that the words of the codicil, "should she leave the whole or part of this property, I want it given at her death, one-half," etc., imply a power of disposition by Daisy Emrich Charlesworth of the whole property devised and bequeathed. This contention cannot be sustained. A portion of this property was furniture or such property that all or a part of it might not be in existence at her death when used by her for life. The words

"whole or part of this property" are entirely consistent with this idea, and the testatrix clearly had in mind that a part of this property might not be in existence at the death of her legatee. She would necessarily leave some of this property at her death but would not necessarily leave all of it, and that idea is expressed in the codicil. The words of the codicil do not imply that there might not be anything whatever left of either the real estate or personal property, as was implied by the wills construed in the cases of *Skinner v. McDowell*, 169 Ill. 365, and *Henderson v. Blackburn*, 104 id. 227. The rule is well settled in this State that where a power of disposal accompanies a bequest or devise of a life estate, the power of disposal is only co-extensive with the estate which the devisee takes under the will and means such disposal as a tenant for life could make, unless there are other words clearly indicating that a larger power was intended. (*Henderson v. Blackburn*, *supra*; *In re Estate of Cashman*, 134 Ill. 88; *Welsch v. Belleville Savings Bank*, 94 id. 191; *Wardner v. Baptist Memorial Board*, 232 id. 606.) It is now well established that a testator may bequeath a life estate in personal property to another and limit a remainder on it. *Hetfield v. Fowler*, 60 Ill. 45; *Welsch v. Belleville Savings Bank*, *supra*.

It is suggested by appellee that in the bequest to Lucy Wing Skiff there was a clear intent of the testator manifested that she should not have disposition of the property bequeathed to her, because in the remainder over in that bequest she named the amount that would remain and that was to be given over, while in the devise to Daisy Emrich Charlesworth she did not name the amount of remainder that would be left over, and that this is an additional reason for saying that the latter has a complete disposition of the property during life. The real purpose of naming the amount in the first codicil, numbered 2 by testatrix, that should be given over to the Congregational Woman's

Board of Missions of the Interior is, that she wanted that board to have just \$1500, and the remainder to the Congregational Board of Ministerial Relief was only to be what remained after deducting the \$1500, and the remainder she described as \$1500 more or less.* She discloses by her language simply that she does not know what the property bequeathed to Lucy Wing Skiff amounted to in value, and therefore, as she wanted the first board to have exactly \$1500 after the death of the life tenant, she so expressed it. This language in no way indicates that she intended to give Daisy Emrich Charlesworth the absolute disposition of her property, when considered with the further fact that the remainder over in the second codicil was not definitely stated in value.

Where a life legacy consists of money, the practice prevails in courts of chancery to require security of the life legatee, notwithstanding that he may be perfectly responsible, and even where there is no showing that there is danger of it being wasted. (*Kinnard v. Kinnard*, 5 Watts, 110; *Hetfield v. Fowler*, *supra*; *Whittemore v. Russell*, 80 Me. 297; *Scott v. Scott*, 23 L. R. A. (N. S.) 716, and note.) The exception to that rule is that the money will be paid to the life tenant when the will clearly discloses that that was the testator's expressed intent. No such expressed intent appears in the will in question. The decree of the circuit court should therefore have required appellee to give bond for this money, or should have placed the money in the hands of a trustee, to be invested for the use of the life tenant, and the remainder paid over by the trustee to appellant, as contended for by it.

The decree of the circuit court is reversed and the cause remanded, with directions to enter a decree in harmony with the views herein expressed.

Reversed and remanded, with directions.

CARTWRIGHT and THOMPSON, JJ., dissenting.

(No. 12723.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. HARRY A. DUBIA, Plaintiff in Error.

Opinion filed October 27, 1919.

1. CRIMINAL LAW—*what evidence of value of defendant's property is admissible on trial of insolvent banker.* On the trial of an insolvent banker under section 25a of the Criminal Code, evidence of the amount for which the property of certain bankrupt corporations was sold by the trustee in bankruptcy is admissible to enable the jury to determine the value of the defendant's property, where defendant was sole owner of the capital stock of said corporations.

2. SAME—*when banker is presumed to have known he was insolvent.* Where a banker is being prosecuted for receiving a deposit while insolvent, and it is proved that he was insolvent when the deposit was received, had been insolvent for some time and closed his bank a few hours after receiving the deposit, it is to be presumed that he knew he was insolvent.

3. SAME—*questions not presented to Appellate Court cannot be raised in Supreme Court.* The Supreme Court reviews the judgment of the Appellate Court on the questions presented to that court, and questions not so presented cannot be raised for the first time in the Supreme Court.

4. SAME—*money accepted as deposit by insolvent banker need not be described if value is alleged and proved.* On the trial of an insolvent banker under section 25a of the Criminal Code it is necessary to allege and prove the fact that money was deposited and its value, but if value is alleged a more specific description of the money is not necessary, and proof that the receiving teller accepted the money as a deposit and gave credit for it as currency is sufficient, although the indictment alleges the particular kinds and denominations of the currency.

5. SAME—*evidence of collection of checks accepted as a deposit by insolvent banker is not necessary.* On the trial of a banker charged with receiving deposits while insolvent, where the money was deposited in the form of checks, which were accepted and credited as currency by the receiving teller, it is not necessary to prove that the checks were collected.

6. SAME—*jury may decide upon punishment by imprisonment for violation of section 25a of Criminal Code.* The jury, in finding an insolvent banker guilty under section 25a of the Criminal Code, may determine that the defendant shall be punished by imprisonment in the penitentiary in addition to the fine prescribed by statute.

7. SAME—*section 6 of division 14 of the Criminal Code applies where jury decides upon punishment by imprisonment.* Section 6 of division 14 of the Criminal Code, providing that the jury shall fix the term of imprisonment, applies to cases where the jury decides upon imprisonment in the penitentiary as punishment for the crime and is not limited to cases where the law fixes such punishment as a necessary result of conviction.

8. BANKS—*what is meant by currency.* Currency in United States money includes bank bills or other paper money issued by authority and which passes as and for coin.

9. SAME—*checks are prima facie of the value for which drawn.* Checks drawn against deposits of money and accepted by a bank as a deposit for their face value are *prima facie* of that value.

WRIT OF ERROR to the Second Branch Appellate Court for the First District;—heard in that court on writ of error to the Criminal Court of Cook county; the Hon. KICKHAM SCANLAN, Judge, presiding.

JOHN S. HUMMER, and THOMAS F. DONOVAN, for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, MACLAY HOYNE, State's Attorney, and SUMNER S. ANDERSON, (EDWARD E. WILSON, EDWIN J. RABER, and GROVER C. NIEMEYER, of counsel,) for the People.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Harry A. Dubia, plaintiff in error, conducted a private bank under the name "Industrial Savings Bank,—Campbell, Dubia & Co.," at 2007 Blue Island avenue, in the city of Chicago, from the year 1900 until four o'clock P. M. of September 21, 1916, when he instructed the cashier to close the bank and not to re-open it. About 2:30 o'clock in the afternoon of that day Joe Lory made a deposit amounting to \$402.63, consisting of currency \$225, gold \$10, silver 91 cents, and eleven checks on Chicago banks aggregating \$166.72, for which a credit was entered on his

bank book and on the bank account. The next day creditors filed a petition in the district court of the United States praying that plaintiff in error be adjudged a bankrupt and for the appointment of a receiver. After a hearing he was adjudged a bankrupt and the Central Trust Company of Illinois was appointed receiver and subsequently was appointed as trustee in bankruptcy and administered his estate. He was indicted in the criminal court of Cook county for a violation of section 25a of division 1 of the Criminal Code. Upon a trial he was found guilty, and by the verdict his punishment was fixed at imprisonment in the penitentiary for a term of three years and a fine of \$805. The court imposed sentence in accordance with the verdict of the jury. He sued out a writ of error from the Appellate Court for the First District, and that court affirmed the judgment in all respects except as to the term of imprisonment, but as to it reversed the judgment and remanded the cause to the criminal court, with leave to the State's attorney to move for, and direction to the court to enter, a judgment making the sentence to the penitentiary indeterminate. He sued out a writ of error from this court to review the judgment of the Appellate Court.

The books of account of the defendant were introduced in evidence on the trial, and it was stipulated that on the face of the books the defendant was insolvent at the time of closing the bank and had been insolvent for some years prior thereto. Besides the banking business the defendant was the owner of the entire capital stock of two corporations,—the Chicago Dry Kiln Company and the American Compound Door Company,—except a few shares issued to dummies to qualify them to act as officers. These corporations were operated for a time by the receiver under the direction of the district court and their assets and property were sold by the trustee in bankruptcy. The trial court admitted evidence of the amount for which that property was sold several months after the bank was closed,

in connection with evidence of the sale of the real estate, bank fixtures and safety deposit vault belonging to the bank. The admission of the evidence is alleged as error because the sale was made some time after the bank closed and by the trustee, but no objection was made to the evidence when offered, the only objection being to evidence of the payment of the taxes of 1915 out of the proceeds. An objection would have been unavailing, because the evidence was competent, in connection with all other evidence in the record, to enable the jury to determine the value of the defendant's property; (*People v. Hartenbower*, 283 Ill. 591;) but aside from that evidence it was proved, beyond all doubt, that the defendant was insolvent when the deposit was received and had been insolvent for a considerable time. It is to be presumed that he knew whether or not he was solvent, (*Meadowcroft v. People*, 163 Ill. 56,) and the facts proved would admit of no other conclusion. The assets of the bank consisted largely of notes of the defendant and the corporations which he owned, his personal notes payable to his own bank and in his own possession, amounting to \$95,000, and the notes of his corporations, which were in reality his own notes, amounting to several times that sum. He was proved guilty beyond all reasonable doubt by competent and unobjectionable evidence.

There was evidence that the personal account of the defendant with the bank for the year before it closed was \$44,282.20, and that \$20,000 of that sum was used by him for his personal expenses. It is objected that the evidence as to the large amount of money spent for personal expenses was incompetent, because it tended to prejudice the jury and increase his punishment. The defendant objected to the evidence at the trial, but it appears from a certified copy of the brief and argument filed in the Appellate Court that it was not mentioned there. This court reviews the judgment of the Appellate Court on the questions presented

to that court and questions not so presented cannot be raised for the first time in this court. (*People v. Strauch*, 240 Ill. 60; *People v. Forster*, 280 id. 486.) The question whether it was proper to advise the jury of the manner in which the defendant was using the money of depositors, as affecting the degree of punishment, will not be considered.

It is next argued that the verdict was not sustained by the evidence because the deposit was not proved to have been of the various kinds of money described in the indictment except as to \$10 in gold. Section 25a makes it a criminal offense for a banker to receive from any person any money, check, draft, bill of exchange, stocks, bonds or other valuable thing which is transferable by delivery when the banker is insolvent. If money is deposited it is necessary to allege and prove that fact and its value, but if value is alleged a more specific description of the money is not necessary. (*Brown v. People*, 173 Ill. 34.) Although unnecessary, the indictment charged the deposit of great numbers of United States treasury notes, bank bills and national currency of certain specific denominations and values, covering all sorts of currency and amounting to a very great sum. The argument is that as the indictment alleged the nature of the currency and the several denominations, the People were bound to make proof of the particular kinds. The evidence was that the deposit was in currency in United States money, by which is understood bank bills or other paper money issued by authority and which passes as and for coin. (*Marine Bank of Chicago v. Rushmore*, 28 Ill. 463.) The receiving teller accepted the money as a deposit and gave credit for it as currency, and it was not necessary to prove more.

The record contains no evidence of payment of the checks, and it is insisted that such proof was necessary. Checks are drawn, with practical uniformity, against deposits of money and are taken and accepted by banks as

deposits for their face value, and they are *prima facie* of that value. (*American Express Co. v. Parsons*, 44 Ill. 312; *Hayes v. Massachusetts Mutual Life Ins. Co.* 125 id. 626.) Presumptions arise from the usual and ordinary course of business, and while a check, if not collected, can be charged back by the banker to the depositor, such an occurrence is very unusual, and it was not necessary to prove that no such condition occurred. The receiving teller testified that he made the entry in Lory's book and put the checks through the bank in the regular manner and they were credited at their face value as a part of the deposit. A *prima facie* case was made and not overthrown.

The verdict found the defendant guilty and that he should be punished by imprisonment in the penitentiary in addition to the fine prescribed by the statute, and it is argued that the determination of the question whether the defendant should be imprisoned in the penitentiary was for the court and not for the jury. The argument is based on section 9 of division 14 of the Criminal Code, which provides for cases where the accused pleads guilty and all other cases not otherwise provided for, in which the court must fix the time of confinement or the amount of the fine, or both, as the case may require. In case of a conviction under section 25a the proper authority to determine whether the punishment shall be confinement in the penitentiary is provided for in section 6. The reasonable construction of that section is that it applies to cases where the jury decides upon confinement in the penitentiary as punishment for the crime, and that it is not limited to cases where the law fixes such punishment as a necessary result of conviction.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(No. 12428.—Reversed in part and remanded.)

THE PEOPLE *ex rel.* Henry Stuckart, County Collector, Appellee, *vs.* THE CHICAGO AND ALTON RAILWAY COMPANY, Appellant.

Opinion filed October 27, 1919.

1. TAXES—*when appropriation of tuberculosis sanitarium fund should be divided in ordinance.* Under the provisions of the Cities and Villages act requiring that the appropriation ordinance and the tax levy ordinance shall specify the objects for which the appropriation is made and the amount appropriated for each purpose, an appropriation under the act of 1917 for public tuberculosis sanitariums should not include in one sum "the amount necessary to erect buildings, improve grounds, install equipment and cover all expenses of maintenance and operation."

2. SAME—*county clerk may extend levy of city tax to include amount necessary for playground purposes under the amendment of 1917.* Where the amount appropriated for playground purposes, when added to the levies for other corporate purposes, makes a larger amount than can be produced by the permissible rate, under the amendment to the Revenue act the county clerk may extend a rate sufficient to include the playground fund, as the additional rate allowed for such purpose is not a special tax but simply extends the minimum, so that there may be an addition to the general corporate tax sufficient to take care of the playgrounds.

3. SAME—*section 9 of Police Pension Fund act, as amended in 1917, is not retrospective.* The amendment of 1917 to section 9 of the Police Pension Fund act, authorizing the city of Chicago to levy a tax not exceeding nine-tenths of a mill on the dollar, is not retrospective in its operation and does not authorize such a tax to be levied in February, 1917, in excess of the then existing rate.

4. SAME—*county clerk in extending tax is limited to tax levy ordinance.* The county clerk in extending a city tax must get his information from the tax levy ordinance certified and filed in his office by the city clerk, and he has no right to consider information which the city comptroller may have as to the amount of money in the bond fund derived from prior levies, as such information can be used only by the city council in making subsequent levies.

5. SAME—*corporate authorities have discretionary power in estimating amount of taxes required each year.* As it is the duty of corporate authorities to have in the treasury at all times enough money to meet all claims, said authorities may exercise discretion-

ary power in estimating the amount of taxes required each year, and the courts will not interfere except to prevent a clear abuse of such power or where the amount levied is so grossly excessive as to show a fraudulent purpose.

6. *SAME—burden is on the objector.* The presumption is that all public officials having connection with the taxes have properly discharged their duties as to levying the same, and the burden rests upon the objector to prove the invalidity of the levy objected to.

7. *SAME—the trial court's rulings in sustaining objections to separate items cannot be questioned by cross-errors.* Where a taxpayer has appealed from a judgment of the county court overruling his objections to certain items in a city tax levy, the county collector, by filing cross-errors, cannot raise the question as to the correctness of the trial court's rulings in sustaining objections to certain other items which are separate and distinct from the items involved in the appeal.

8. *STATUTES—an act will not be given retrospective effect unless such intention is clearly shown.* An act of the legislature will not be given a retrospective effect unless the intention of the legislature to give it such effect is clearly shown.

APPEAL from the County Court of Cook county; the Hon. S. N. HOOVER, Judge, presiding.

LANDON & HOLT, and ELLIS & LEWIS, (WILLIAM F. STRUCKMANN, of counsel,) for appellant.

MACLAY HOYNE, State's Attorney, (SAMUEL A. ETTELSON, Corporation Counsel, CHARLES C. CASE, and LEON HORNSTEIN, of counsel,) for appellee.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

Appellant, the Chicago and Alton Railway Company, a tax-payer of the city of Chicago and the county of Cook, in Illinois, as defendant in an application by the county collector of said county for judgment and order of sale for unpaid taxes for 1917, filed objections to the following items of city tax: The total levy for the tuberculosis sanitarium

fund, the municipal employees' pension fund and the playgrounds fund, and a part of the levy for the firemen's pension fund, the police pension fund and the bond fund. The court sustained the objections to the firemen's pension fund and the municipal employees' pension fund and refused judgment for those items and overruled the objections to the other items. Objections were filed to the non-high-school district tax, and these objections were overruled by the court. Judgment and order of sale were entered for those taxes to which objections had been overruled. An appeal has been taken to this court by the Chicago and Alton Railway Company to review the judgment of the county court of Cook county in overruling its objections.

Appellant contends that all the municipal tuberculosis sanitarium fund tax is invalid for the reason that neither the appropriation ordinance nor the tax levy ordinance of the city of Chicago specifies the objects and purposes for which the appropriation is made and the amount appropriated for each object and purpose. The specification in the ordinance to which objection is made is "for the amount necessary to erect buildings, improve grounds, install equipment and cover all expenses of maintenance and operation and care of persons throughout the city afflicted with tuberculosis, \$994,000; estimated loss and cost of collection, \$84,000." Section 2 of article 7 of the Cities and Villages act provides that in the annual appropriation ordinance the cities shall specify the objects and purposes for which appropriations are made and the amount appropriated for each object or purpose, and section 1 of article 8 makes similar provisions with respect to the tax levy ordinance. Under the act which enables cities and villages to establish and maintain public tuberculosis sanitariums, (Hurd's Stat. 1917, p. 544,) broad and extended powers are given. The city has authority to erect a public sanitarium and auxiliary branches, dispensaries and other institutions. In addition to erecting and maintaining these buildings the city is au-

thorized to extend the benefits and privileges into private homes. Doctors and nurses may be employed and all of the expenses incident to treating the patient afflicted with this disease may be incurred. Manifestly, many objects and purposes are included in the single specification in the appropriation ordinance. It has been repeatedly held by this court that the language used in the Cities and Villages act with respect to appropriations prohibits such a general specification as is here used. It is clear that this appropriation could easily have been divided into four divisions,—the amount necessary to erect buildings, the amount necessary to install equipment, the amount necessary to maintain and operate the buildings for the year, and the amount necessary to pay the salaries and wages of the doctors, nurses and attendants. The objection to this item should have been sustained. In support of our conclusion we cite the following cases, where reasons are given for the holding: *People v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co.* 231 Ill. 209; *People v. Bowman*, 253 id. 234; *People v. Vogt*, 262 id. 170; *People v. Ross*, 272 id. 63. In *People v. Klee*, 282 Ill. 440, we said that the heading of an item by the words "building purposes" clearly indicated that at least a part of the item was levied for erecting buildings. We there held that if the erecting of buildings was contemplated, the amount to be expended was ascertainable and that the tax-payer was entitled to know this amount and to know the building and its use. Otherwise this million dollar fund might be dissipated in salaries and no permanent buildings be left at the end of the year to show for the money expended.

The city council in its annual appropriation ordinance for 1917 appropriated \$103,172 for salaries and wages for playground purposes, and \$5000 for the construction of playground buildings, wading pools and shelters. This amount, together with the levies made for other corporate purposes, created a larger amount than could have been

produced by a rate of \$1.10 on each \$100 of the assessed value of taxable property of the city of Chicago. By an amendment to the revenue laws (Laws of 1917, pp. 663, 669,) the rate permissible at the time the tax was extended was \$1.10 on each \$100 assessed valuation, "and in addition thereto a rate not to exceed five cents on each \$100 of assessed value as will produce the amount of the annual appropriation of such cities and villages for playground purposes." In order to produce the \$108,172 appropriated for playground purposes in addition to the levy for other corporate purposes, the county clerk extended the rate of \$1.1102. The words quoted clearly indicate that it was the intention of the legislature to increase the minimum for general corporate purposes. This act does not authorize a special tax to be levied for playgrounds but it simply extends the minimum, so that there may be an addition to the general corporate tax sufficient to take care of the playgrounds. The court properly overruled the objection to this tax.

The objection to the police pension fund tax involves the construction of section 9 of the act creating a police pension fund, as amended June 14, 1917. (Laws of 1917, p. 274.) This amendment authorizes Chicago to levy a tax not exceeding nine-tenths of a mill on the dollar. Prior to 1917 the amount was restricted to seven-tenths of a mill. (Laws of 1915, p. 304.) The amount levied by the city in February, 1917, requires a rate of \$.0716, or \$.0016 more than the amount authorized by the act of 1915,—the law then in effect. Appellant contends that the amendment is inoperative as to the tax of 1917 on the theory that statutes are intended to operate *in futuro*. The law is well settled that an act of the legislature will not be given a retrospective effect unless the intention of the legislature to give it such effect is clearly shown. In *People v. Deutsche Gemeinde*, 249 Ill. 132, we said: "Statutes are not to be given a retrospective operation, even where the General Assembly might right-

fully give them such operation, unless the intention to do so is clearly expressed. No rule of interpretation is better settled than that no statute will be allowed a retrospective operation unless the will of the General Assembly is declared in terms so plain and positive as to admit of no doubt that such was the intention. Retrospective laws, although they may be valid, are looked upon with disfavor, and an intention that laws shall have such operation will not be supposed unless manifested by the most clear and unequivocal expressions." A careful reading of the amendment of 1917 discloses no intention whatsoever upon the part of the General Assembly that such amendment should operate retrospectively, and in the absence of such intention, clearly expressed, such act will be held to operate prospectively. The lower court erred in not sustaining the objection of appellant to that portion of the police pension fund tax in excess of seven-tenths of a mill on the dollar.

The tax levy ordinance for the year 1917 fixed as the sum to be raised to discharge principal and interest on bonds, \$5,382,863, and to cover loss and cost of collection of the same, \$269,134.15. Appellant contends that this amount should have been reduced by moneys in the bond fund obtained from prior levies. Appellee contends that when the levy was made the amount of salvage from prior levies could not be ascertained, and could not, therefore, be taken into consideration. The county clerk in extending the tax must get his information from the tax levy ordinance certified and filed in his office by the city clerk, and though at the time tax was extended the city comptroller may have known the amount of money in the bond fund derived from prior levies, the county clerk had no right to consider such information. (*People v. Sandberg Co.* 282 Ill. 245.) The information could only be used by the city council in making subsequent levies. It appears this was done in 1918. In *People v. Sandberg Co.* 277 Ill. 567, we held that it was the duty of the public authorities to use

sound business judgment on the question of estimating the amount of taxes required each year. It is their duty to have in the treasury at all times enough money to meet all claims upon it, and the court will not interfere with the decision of the public authorities on that question except when it is necessary to prevent a clear abuse by such officials of their discretionary powers. The burden rests upon the objector to sustain his objection to a tax. The presumption is that all public officials having connection with the taxes have properly discharged their duties as to levying the same. The mere circumstance that in estimating in advance the amount that may be necessary for any purpose a larger amount is levied than that actually required is no reason why a tax-payer should refuse to pay his taxes unless the amount levied is so grossly excessive as to show a fraudulent purpose in making the levy. Appellant has made no such showing in this case and the court properly overruled objections to this item of tax.

The objections made by appellant to the non-high-school district tax have been considered in *People v. Chicago and Northwestern Railway Co.* 286 Ill. 384, and *People v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co.* 288 id. 70, and for the reasons there given we hold that the court properly overruled objections to this tax.

Appellee has filed cross-errors to the ruling of the court in sustaining appellant's objections to the firemen's pension fund and to the municipal employees' pension fund. These items are entirely independent and distinct from the items heretofore considered. The judgment as to the different items is, in effect, a distinct judgment as to each item. An appeal may be taken from one item without in any manner affecting the record as to the other distinct item, the decision as to one item having no influence or bearing on the decision as to the other items. If appellee desired to raise the question as to the correctness of the trial court's rulings on these items he should have appealed from that decision.

He cannot raise that question by cross-errors. *People v. Vogt, supra.*

For the reasons here given the judgment in this case is affirmed in part and reversed in part and the cause remanded for further proceedings in harmony with the views herein expressed.

Reversed in part and remanded.

(No. 12806.—Decree affirmed.)

THE TRUSTEES OF EUREKA COLLEGE, Appellee, vs. MARY E. BONDURANT *et al.* Appellants.

Opinion filed October 27, 1919.

1. *DEEDS—what is a condition subsequent.* A condition subsequent is one which operates on an estate already created and vested and renders the estate liable to be defeated.

2. *SAME—a condition contrary to law or public policy is void.* The right to annex conditions to a conveyance is an incident of the right of property, but the right to impose conditions or restrictions must be exercised reasonably, and a condition the compliance with which is impossible or against law or public policy is void.

3. *SAME—effect where condition is void.* If a condition is void because compliance with it is impossible or in violation of law or public policy no estate vests in the grantee where the condition is precedent, but where the condition is subsequent the estate vests freed from the condition.

4. *SAME—effect where deed to corporation contains condition subsequent contrary to act of incorporation.* Where a condition subsequent in a deed of donation to an incorporated college requires the land to be held perpetually by the grantee and that the income therefrom shall be a perpetual fund for the use of the college, but the act incorporating the college requires that land donated be sold within ten years from the date of the donation, the condition is void and the grantee holds in fee simple.

APPEAL from the Circuit Court of Piatt county; the Hon. GEORGE A. SENTEL, Judge, presiding.

CARL S. REED, and HERRICK & HERRICK, for appellants.

MILLS BROS. for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

This is an appeal from a decree of the circuit court of Piatt county declaring and quieting title in appellee, the trustees of Eureka College, a corporation, to 202.25 acres of land in Piatt county.

On and prior to June 11, 1897, Thomas E. Bondurant was the owner of a large number of acres of land, including the 202 acres herein involved. Bondurant was a member of the board of trustees of Eureka College on June 11, 1897, and on said date conveyed to appellee said 202 acres of land by warranty deed, which was duly recorded. The deed reserved to the grantor the possession, use and profits of the land during his life, he to pay appellee annually on the first of March of each year, beginning March 1, 1898, \$500 during his lifetime and to pay the taxes on the land. The consideration expressed in the deed was "one dollar and the trusts hereinafter stated." The deed contained the provisions that the conveyance was made upon condition that the trustees had then obtained by gifts and donations, lands, moneys or other securities in value of \$100,000, in such manner that they and their successors in office should receive the income and profits therefrom for the college forever, and upon the further condition that the rents, issues and profits from the land conveyed by the deed should be applied and used only for the use and benefit of Eureka College under the direction of its trustees, and that the receipts from the land should not be otherwise used but should be and remain a perpetual fund for such use and purpose. It was further provided that the trustees of the college should pay all taxes on the land out of the rents and profits derived therefrom or some other fund, "and in case of failure to pay such taxes, or upon failure to use the said lands, and the rents, issues and profits thereof, as in and by this deed provided, the title of the said lands shall revert to and vest in the grantor, or, in case of his death,

in his heirs or assigns, and this conveyance and everything herein contained shall cease and be absolutely null and void." Bondurant was never married. He resided in Piatt county and died testate January 16, 1905, and after making certain specific bequests he devised the residue of his estate to certain missionary societies. His will was duly admitted to probate, his estate administered and settled and the executrix discharged. Bondurant's heirs were a brother, two sisters and a large number of nephews and nieces. After his death appellee went into possession of the land, has remained in possession and paid the taxes thereon and received the rents and profits therefrom.

The bill in this case was filed in September, 1918. The bill alleged that at the time the deed was made appellee had to the satisfaction of Bondurant obtained by gifts and donations, lands, moneys and other securities of the value of \$100,000 in such manner that the income therefrom was to be used for the benefit of the college. The bill alleged that the conditions that the income from the land conveyed should be used only for the benefit of the college, that the receipts and income from said land should be and remain a perpetual fund for such use, that the taxes were to be paid by the grantee out of the rents and profits or from some other fund, and upon the failure to use said land and the rents and profits therefrom as provided in and by the deed the title should revert to and vest in the grantor or his heirs or assigns and the conveyance be and become null and void, were contrary to the provisions of section 6 of the act incorporating appellee, contrary to law and contrary to the public policy of this State, and that said conditions were and are null and void and of no force or effect and appellee became seized in fee simple of said real estate. The bill alleged that the act incorporating appellee was a private act; that the conditions in said deed are a cloud upon appellee's title and tend to depreciate its value and prevent the sale of the land; that appellee desires to sell the land

and apply and use its value and the income therefrom for the benefit of Eureka College under the direction of its trustees, and that the same be and remain a perpetual fund for such use and purpose, in accordance with the provisions of said section 6 of the act incorporating appellee. The heirs of Bondurant, his residuary legatees and devisees and the Attorney General of Illinois were made parties defendant to the bill. No question of fact raised by the answers is presented to us for decision. The cause was referred to the master in chancery, who, after hearing certain proofs offered, reported his conclusions that the conditions in the deed contained to limit the title of appellee are contrary to the provisions of the act of the General Assembly creating and incorporating appellee, are contrary to the public policy of the State of Illinois and that said conditions of limitation are null and void, and that appellee became and is seized in fee simple of said real estate. The master recommended a decree granting the relief prayed in the bill. Exceptions to the master's report were overruled by the chancellor and a decree entered granting the relief prayed.

Both parties are agreed that the conveyance was on condition subsequent, viz., (1) that appellee had then obtained by gifts and donations, lands, moneys or other securities of the value of \$100,000 for use of the college, as stipulated in the deed; and (2) that the rents and profits of the land conveyed should be used for the benefit of the college, and that such receipts should be and remain a perpetual fund for such use and purpose and in case of failure of these conditions the title to revert. It is not denied by appellants that appellee has complied with the first condition, and it is not denied by appellee that by its bill it seeks to avoid compliance with the second condition.

Appellee was incorporated by special act of the General Assembly approved February 6, 1855, entitled "An act to incorporate Eureka College." Section 6 of the act was set out in full in the bill and the entire act was offered in evi-

dence. The act authorizes appellee to acquire, hold and convey real and personal property in all lawful ways. Section 6 is as follows: "The trustees shall faithfully apply all funds collected by them, according to the best of their judgment, in erecting suitable buildings, in supporting the necessary instructors, officers and agents, the procuring books, maps, charts, globes and all philosophical and chemical apparatus to aid and promote sound learning in the institution: *Provided*, that in case any donation, devise or bequest shall be made for particular purposes accordant with the objects of the institution and the trustees shall accept the same, every such donation, devise or bequest shall be applied in conformity with the express condition of the donor or devisor: *Provided, also*, that if the donation be in real estate, that the lands be sold within ten years from the date of said donation and the value thereof be applied as specified by the donor."

A condition subsequent is one which operates on an estate already created and vested and renders the estate liable to be defeated. (*Koch v. Streuter*, 232 Ill. 594; *Nowak v. Dombrowski*, 267 id. 103; *Star Brewery Co. v. Primas*, 163 id. 652; 4 Kent's Com. 126.) The right to annex conditions to a conveyance is an incident of the right of property, but the right to impose conditions or restrictions must be exercised reasonably, with due regard to the law and public policy. A condition the compliance with which is impossible or in violation of law or public policy is void. If such a condition is a condition precedent no estate vests in the grantee, but if it is a condition subsequent the estate vests freed from the condition and the grantee's estate is absolute. These principles, of universal application, have been so frequently and fully discussed in reported decisions and by text writers that it is unnecessary to do more than refer to some of the authorities. *St. Louis, Jacksonville and Chicago Railroad Co. v. Mathers*, 71 Ill. 592; *Gray v. Chicago, Milwaukee and St. Paul Railway Co.* 189 id. 400;

Hite v. Cincinnati, Indianapolis and Western Railroad Co. 284 id. 297; *Tiedeman on Real Prop.* 228, 229; 2 *Washburn on Real Prop.* (3d ed.) 447, 448; 1 *Tiffany on Real Prop.* 167.

Appellee was created by the act of 1855 a corporation to have perpetual succession, with power to hold and convey real estate. Section 6 defines the purposes for which funds collected by the corporation shall be used, and in case of a donation of land, that it shall be sold "within ten years from the date of said donation and the value thereof be applied as specified by the donor." Compliance with the condition that the rents, issues and profits from the land donated should be and remain a perpetual fund for the use of the college would require that the land be held perpetually by appellee. This it was forbidden to do by the law, which required appellee to sell within ten years land donated to it, and where the donor had expressed the particular purpose and use to be made of the donation, the proceeds of the sale are required to "be applied as specified by the donor." Under the act of incorporation, where land donated to appellee is sold, the proceeds of the sale are to be held subject to the same trust purposes upon which the land was donated and held by the college during the time it could lawfully hold the land. In other words, the income from the money received from the sale of the land will be required to be used for the same purposes the income from the land was required to be used by the conditions of the donation, the *corpus* of the fund to be used only to produce an income.

The decree of the circuit court is supported by the law, and it is affirmed.

Decree affirmed.

(No. 12732.—Decree affirmed.)

FANNIE PEMBERTON *et al.* Defendants in Error, *vs.* FANNIE KRAPER, Plaintiff in Error.

Opinion filed October 27, 1919.

1. **DEEDS**—*delivery is essential to operation of deed.* Delivery is essential to the operation and validity of a deed.

2. **SAME**—*question of delivery is one of intention of grantor.* The question of delivery of a deed is largely a question of the intention of the grantor, which must be gathered from all the circumstances connected with the transaction, and each case must be decided on its own facts.

3. **SAME**—*what necessary to constitute delivery.* To constitute delivery of a deed it must clearly appear that it was the grantor's intention that the deed should pass title at the time and that he should lose control over it, and if the deed is not actually delivered but is to become effective upon the happening of some future event, such as the death of the grantor, there is no valid delivery.

4. **SAME**—*intention to deliver may be shown either by direct or presumptive evidence.* The intention of the grantor to deliver a deed and of the grantee to accept it may be shown by direct evidence of the intention or may be presumed from acts and declarations of the parties, and in like manner presumptions of delivery may be rebutted and overcome by proof or presumption of a contrary intention.

5. **SAME**—*when decree setting aside deed will not be reversed.* A decree setting aside a deed disposing of all of the grantor's estate to her daughter will not be set aside except for apparent error, where the sole issue is as to the delivery of the deed, and the material evidence on the question, which is almost entirely contained in the conflicting testimony of the grantor and the grantee, tends to show the grantor did not intend the deed to be delivered before her death.

WRIT OF ERROR to the Circuit Court of Hamilton county; the Hon. JULIUS C. KERN, Judge, presiding.

W. L. KRONE, (J. WILSON JONES, of counsel,) for plaintiff in error.

W. W. DAILY, and H. ANDERSON, for defendants in error.

Mr. JUSTICE CARTER delivered the opinion of the court :

This was a bill filed in the circuit court of Hamilton county to set aside a deed to a house and lot in McLeansboro, in that county, made by defendants in error, Fannie Pemberton and her husband, Benjamin T. M. Pemberton, purporting to convey said property to her daughter, Fannie Kraper. After the pleadings were settled the chancellor, on hearing, entered an order that said deed was a cloud upon the title to the premises therein described and that the same should be canceled and set aside, and that in default of the surrender of the deed for cancellation and a new conveyance by Fannie Kraper to her mother, the master in chancery should execute a deed of conveyance to remove the cloud upon the title of defendants in error. The case has been brought to this court by writ of error.

The defendant in error Fannie Pemberton is an aged woman, eighty-two years old, and in April, 1917, she and her husband occupied the premises in question, which she owned. The evidence tends to show this was substantially the only property they had. She was the second wife of her husband, Benjamin T. M. Pemberton. He had several grown children by his first marriage, while Fannie Kraper was her only child. Some time prior to April 19, 1917, Mrs. Pemberton decided that she wished to make a will leaving her property to her daughter, but after a conference with an attorney she decided to execute this deed. J. H. Lane, an attorney, testified that William T. Pemberton, a step-son of Fannie Pemberton, came to his office and asked him to call at the Pemberton home; that he went there and talked with the aged couple and then went back to his office and prepared the deed in question according to their instructions, which he gave to William T. Pemberton with the understanding that the latter was to get a notary public to take the acknowledgment. The instrument in question is in the usual form of statutory warranty deed, with re-

• lease of homestead rights, and is dated and acknowledged April 21, 1917, signed by Fannie Pemberton and her husband, conveying the premises to Fannie Kraper for the expressed consideration of \$1000, and also containing a clause reading: "The grantors herein reserve the possession, rents, issues and profits of the above described premises during the natural lives of both of them." It was recorded the day of its date. The step-son, William T. Pemberton, testified that after the deed was signed and acknowledged he took it and had it recorded, but that his step-mother, Mrs. Pemberton, never said anything to him about having it recorded; that he did this of his own accord, without any directions from her; that he afterwards got the deed back from the recorder and gave it to his step-mother; that so far as he remembered Mrs. Pemberton never said anything to him about the deed being recorded. No cash or other valuable consideration was turned over to Mrs. Pemberton by her daughter, Mrs. Kraper, at the time the deed was made or thereafter. While there are some allegations in the pleadings as to Mrs. Pemberton relying on her daughter providing the necessary care and nursing during the rest of her life, there is no definite testimony on this point.

Without question the deed was properly executed and acknowledged, and the only question in dispute is whether it was ever legally delivered. Mrs. Pemberton testified in her own behalf. It is evident from her testimony that she was in poor health and well along in years and did not understand fully the details or remember a great deal about the transaction in question. She testified that she did not have the deed recorded and did not know who recorded it; that her daughter, Mrs. Kraper, was not present when it was made and it was put in a drawer in witness' house and locked up; that she never delivered the deed to her daughter or told anybody to give it to her, and never knew that the property was not her own until someone came to buy the place and told her about the deed being recorded; that

she and her husband were both sick at the time the deed was executed, and that she understood that after her death the deed was to be given to Mrs. Kraper; that she never talked with Mrs. Kraper about the delivery of the deed.

Mrs. Kraper testified that she lived in Metropolis, some distance from the home of her mother, and at Christmas time, in 1917, her mother, having received a fall, sent for witness to come and take care of her; that during the holiday week her mother asked her to bring a drawer containing some of her papers, in order to look after a certain insurance policy; that the drawer in question was locked and witness opened it with a key the mother gave her and at her mother's direction; that at that time her mother took the deed out from among the other papers and handed it to the witness, and said, "Here is the deed to this house and you will have no trouble after I am dead and gone;" that the witness opened the deed and found that her last name was spelled wrong and that at her mother's suggestion she had the name changed in the deed; that she gave the deed to her step-brother, William T. Pemberton, who had recorded it in the first instance, and told him about the mistake in the name, and he took it to attorney Lane and had the change made and then to the recorder's office and had the change made there and then brought it back and gave it to her; that she then took it back to the house, and her mother asked her if it had been changed all right, and she replied that it had; that then witness took the deed to her room and put it in a suit-case and carried it back with her to Metropolis.

The evidence as to the delivery of this deed is confined almost entirely to the testimony of the two witnesses most directly interested and is conflicting. It is conceded that delivery is essential to the operation and validity of a deed. (*Skinner v. Baker*, 79 Ill. 496; *Weber v. Christen*, 121 id. 91; *Lanphier v. Desmond*, 187 id. 370.) Whether the facts in a particular case are sufficient to establish a delivery often

presents a difficult question to determine. The question of delivery is largely one of intention. The intention of the grantor is to be gathered from all the facts and circumstances connected with the transaction. Each case must be decided by the special facts of the particular case. To constitute delivery it must clearly appear that it was the grantor's intention that the deed should pass title at the time and that he should lose control over it. If the deed is not actually delivered but is to become effective upon the happening of some future event, such as the death of the grantor, there is no valid delivery. The intention to deliver on the one hand and of acceptance on the other may be shown by direct evidence of the intention or may be presumed from acts and declarations of the parties. In like manner presumptions of delivery may be rebutted and overcome by proof of a contrary intention or by acts and declarations from which the contrary presumption arises. (*O'Brien v. O'Brien*, 285 Ill. 570, and authorities there cited.) When a deed is in the possession of the grantee named therein, the presumption of law, in the absence of proof to the contrary, is that the deed was signed and sealed according to its purport, and that the grantee, having it in his possession, received it from the grantor,—and this presumption that it has been delivered can only be overcome by clear and convincing proof. (*Reed v. Douthit*, 62 Ill. 348; *Valter v. Blavka*, 195 id. 610; *Inman v. Swearingen*, 198 id. 437.) The deed here had also been recorded, and recording also raises the same presumption that a deed has been delivered. (*Blake v. Ogden*, 223 Ill. 204; *Harshbarger v. Carroll*, 163 id. 636.) But this presumption is fully overcome in this case by the testimony of William T. Pemberton that he had the deed recorded on his own motion and without any instructions or knowledge of his step-mother. While there is considerable difference in the testimony of Mrs. Pemberton and her daughter as to what occurred at the time the deed was taken from the drawer

where it was being kept by the mother, it is evident that much of the daughter's testimony, if not all of it, as to what was done with the deed might be true and her mother's version of the transaction might also be true, if the mother thought all the time that the deed was being returned to the drawer each time it was taken out and that it was not delivered to the daughter and did not have any binding force until her death. Manifestly, that was her understanding and intention. She, herself, was practically bedridden at the time these occurrences took place. The turning point in the case is whether Mrs. Pemberton, when they were looking at the insurance papers, actually turned the deed over to her daughter with instructions to take it with her, or whether she simply showed it to her daughter and the latter took it without knowledge or instruction upon her mother's part and placed it in her suit-case. In view of all the circumstances in the case, the record tends to show that the mother never intended to have the deed delivered to her daughter before the mother's death. The testimony on this question was heard by the chancellor, and as was said by this court with reference to the delivery of other deeds so it may be said here, particularly with reference to the testimony of Mrs. Pemberton: "The weight of her testimony, as of all the testimony in the case, was for the trial court. This court will not reverse the finding of the chancellor unless it is apparent error has been committed. (*Biggerstaff v. Biggerstaff*, 180 Ill. 407; *Dowie v. Driscoll*, 203 id. 480; *Farrenkoph v. Holm*, 237 id. 94; *Amos v. American Trust and Savings Bank*, 221 id. 100.) The chancellor saw and heard this witness testify and was in much better position to judge whether her testimony was worthy of belief than we are from a perusal of the record. We cannot say that it did not justify him in setting aside the deed." *Ackman v. Potter*, 239 Ill. 578.

The decree of the circuit court will be affirmed.

Decree affirmed.

(No. 12701.—Reversed and remanded.)

Laura H. MCKAIG *et al.* Plaintiffs in Error, *vs.* EBENEZER
APPLETON *et al.* Defendants in Error.

Opinion filed October 27, 1919.

1. **WILLS**—*when allegations relating to undue influence should not be stricken.* Allegations relating to undue influence should not be stricken from a bill because they contain recitals of evidentiary facts, where the allegations, in effect, charge that the execution of the will was procured by the undue influence of one of the principal beneficiaries and where most of the evidentiary facts alleged are competent to be proved on the trial.

2. **SAME**—*fact that attorney who drew will is subscribing witness does not affect weight of testimony.* The fact that one of the subscribing witnesses to the will in contest was the attorney who prepared the will and the other witness was an employee of said attorney is not a matter to be considered by the jury in determining the weight to be given their testimony.

3. **SAME**—*what letters should not be admitted in evidence in a will contest case.* In a will contest case, letters purporting to have been sent by the testator to a distant relative and friend are not admissible, where it is admitted that the testator was practically blind when the letters were written and was unable to read or write and it is not shown that he dictated the letters or that they were read to him; and letters from said friend to the testator are likewise not admissible, where it is not shown that the testator ever received them or that they were read to him.

WRIT OF ERROR to the Second Branch Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding.

WILLIAM RITCHIE, and KING, BROWER & HURLBUT, for plaintiffs in error.

HOLT, CUTTING & SIDLEY, (CHARLES S. CUTTING, of counsel,) for the Chicago Title and Trust Company and other defendants in error.

STEIN, MAYER & DAVID, (SIGMUND W. DAVID, of counsel,) for defendant in error Mary A. Cornish.

Mr. JUSTICE FARMER delivered the opinion of the court:

This case comes before this court upon a petition for a writ of *certiorari* to review a judgment of the Appellate Court affirming a decree of the circuit court in a will contest proceeding. Plaintiffs in error were complainants in the trial court and sought to set aside the alleged last will and codicil of George R. H. Hughes, on the grounds that he was not of sound mind and memory at the time the alleged will and codicil were executed and that he was unduly influenced to execute said instruments by Mary A. Cornish, who was a substantial beneficiary.

The will was executed March 26, 1913, and the testator died June 22, 1914, at the age of about eighty-three years. For several years prior to his death his eyesight had been failing him and for some years he was practically blind, being wholly unable to read or write. He left no widow, child or descendants of child, but left a half-sister, Laura H. McKaig, a nephew, William C. Boteler, and two nieces, Mary Boteler Beckley and Laura Boteler, as his next of kin and only heirs, who are the complainants in the bill. The testator owned no real estate, his property consisting principally of a note for \$44,000, secured by a mortgage upon real estate. The Chicago Title and Trust Company was named as trustee in the will and given power to collect, invest and re-invest the property and income during the lifetime of the several annuitants named. The half-sister, Laura H. McKaig, was given \$300 per annum during her life; the niece, Laura H. Boteler, \$200 per annum; Anna Beckwith Hammel \$500 per annum; Nellie Sans \$200 per annum, and Mrs. Cornish \$800 per annum. The will provided that in case of the death of any one or more of the four annuitants other than Mrs. Cornish, before her death, the annuities directed to be paid such deceased annuitants

be paid Mrs. Cornish during her life in addition to the annuity of \$800 directed to be paid her. Upon the death of all the annuitants the trustee was directed to deliver all that remained of the estate to Harrison B. Riley, of Evanston, and Richard H. Pleasants, of Baltimore, Maryland, to become a fund to be known as the Hughes Fund, to be used by said trustees for such educational and charitable purposes in Baltimore and Chicago as they should designate, but in case that provision of the will should be held invalid, then the remaining estate in the hands of the Chicago Title and Trust Company at the death of the last annuitant was to be distributed among the testator's lawful heirs, excluding his nephew, William C. Boteler, and his niece, Mary Boteler Beckley. The distribution, excluding said nephew and niece, was to be made in accordance with the statute of the State of Illinois. A codicil to the will, dated January 6, 1914, states that the annuitant Mrs. Hammel had died since the execution of the will, and the annuity to Mrs. Cornish was increased to \$1300. The codicil further changed the disposition of the estate remaining after the death of all the annuitants by directing payment to St. Paul's Reformed Episcopal Church of \$5000, to the Scroll and Key Society of Yale College \$5000, and to a nephew, Reginald Hughes McKaig, \$1000, the remainder to go to the same trustees, to be administered as provided in the original will.

The testator for some time had lived in and occupied a room in a rooming house, and Mrs. Cornish had for several years been his attendant and nurse, caring for both his person and room. Her practice appears to have been to visit Hughes in his room some time during the forenoon and remain with him until some time during the afternoon, during which time she was employed in such services as were needed by Hughes or his room. She also prepared his meals while in his room.

The bill alleged, in substance, that Hughes was eighty years old, blind and diseased; that he was under the domi-

nation of Mrs. Cornish, whose care he had required for a long time by reason of his physical and mental condition; that Mrs. Cornish was a person of a dominant and insistent character and Hughes was a person of a weak and feeble will; that a confidential relation existed between Mrs. Cornish and Hughes, she being the dominant and he the dependent party, and that the alleged will and codicil were procured to be made by Mrs. Cornish and others acting in concert and confederation with her. The bill with considerable particularity and elaboration set out the alleged facts and circumstances and relationship upon which the charge of undue influence was predicated, and alleged that Mrs. Cornish importuned Hughes to execute the instruments, threatening to desert and leave him if he refused to do so; that the only persons Mrs. Cornish permitted to be present at the time said instruments were executed were the attorney who drew the will and his confidential clerk, both of whom signed it as attesting witnesses. Some of the defendants, not including Mrs. Cornish, filed exceptions to the parts of the bill alleging undue influence, on the ground that said allegations were impertinent, and asked that they be expunged. The court sustained the exceptions and expunged the allegations from the bill relating to undue influence. Mrs. Cornish had answered the bill, denying the allegations of undue influence and lack of testamentary capacity, before the ruling of the court sustaining the exceptions, and after that ruling the other defendants who were not defaulted answered, denying want of testamentary capacity. At the conclusion of proponents' evidence in chief the contestants presented and asked leave of court to file an amendment to the bill charging the will and codicil were procured through the exercise by Mrs. Cornish of undue influence over the testator, which undue influence was operative at the time said instruments were executed. The court denied leave to amend, and at the conclusion of all the evidence instructed the jury there was

no question of undue influence before them, and that the question to be determined by them was whether, at the time of executing said will and codicil, the testator was of sound mind and memory.

Numerous errors are assigned why the judgment of the Appellate Court and the decree of the circuit court should be reversed, but it will not be necessary to consider all of them.

One of the grounds urged for a reversal is the ruling of the court in sustaining the exceptions and expunging from the bill the allegations relating to undue influence. The exceptions set out *in hæc verba* the portions of the bill excepted to, and alleged they are impertinent and ought to be expunged. The order of the court sustaining the exceptions and ordering the parts of the bill excepted to stricken out, states "they are recitals of evidence instead of proper pleading of ultimate facts proposed to be proven." Conceding that some of the allegations of the bill on the charge of undue influence were recitals of evidence and immaterial, as contended by proponents, the bill did allege that because of the physical and mental condition of the testator Mrs. Cornish had been his nurse and attendant for more than two years before the will was executed; that she was of a dominating and insistent character and the testator was of weak and feeble will, yielding to importunity; that Mrs. Cornish had intimate knowledge of the testator's business, property and affairs and acted as his agent in collecting moneys due him, and that she and others acting in concert with her procured the execution of the will and codicil by importunity, and that she threatened to desert and leave the testator if he refused to execute said instruments. That, in substance and effect, is a charge that the execution of the will was procured by the undue influence of one of the principal beneficiaries, and the fact that other and evidentiary facts may also have been alleged did not affect the bill as a good pleading, especially as the facts alleged, or most

of them, were competent to be proved on the trial. (Story's Eq. Pl. sec. 268; *Kirkpatrick v. Corning*, 40 N. J. Eq. 241; *Burden v. Burden*, 124 Fed. Rep. 250; *United States v. Hyde*, 145 id. 393.) The court erred in sustaining the exceptions to the allegations of undue influence, and by refusal to permit the bill to be amended on the trial contestants were prevented from trying that issue. This requires a reversal of the judgment of the Appellate Court and decree of the circuit court.

The rulings of the court in giving and refusing certain instructions are complained of. We do not deem it necessary to discuss all these errors, as the alleged inaccuracies, in view of the discussions in the briefs and authorities cited, may be easily avoided on another trial.

The action of the court in refusing one instruction asked by contestants should be referred to. The will was witnessed by the attorney who drew it, and his stenographer. Said attorney had represented Hughes as counsel previous to the execution of the will and was well acquainted with him. He appeared for the will as counsel in securing its admission to probate. After the bill to contest it was filed, in July, 1915, he entered his appearance as attorney for proponents and rendered active services in their behalf. On behalf of the executor and one of the trustees he filed exceptions to parts of the bill and secured an order sustaining them. He continued to act as counsel, as we understand, until May, 1916, when he withdrew and present counsel have since represented the proponents. The cause was tried in February, 1917, and at the trial said attorney became a witness and testified at length in proponents' behalf. Contestants asked the court to instruct the jury that the law does not favor an attorney who has drawn a will subscribing it as a witness, and that in determining the credibility of the subscribing witnesses to the will and the weight to be given their testimony the jury should take into consideration the fact that one of said witnesses was the attorney

who prepared the will and the other witness was, and still is, an employee of said attorney. Our attention has not been called to any decision of this court that it is not proper for an attorney who draws a will to attest it as a witness, but we have frequently expressed the court's view of the propriety of an attorney in a case becoming a witness and testifying on behalf of the clients he represented and the effect of his relation to the case upon the weight to be given his testimony. (*Wilkinson v. People*, 226 Ill. 135; *Bishop v. Hilliard*, 227 id. 382; *Grindle v. Grindle*, 240 id. 143; *Wetzel v. Firebaugh*, 251 id. 190; *Bailey v. Beall*, id. 577.) It was not error to refuse the instruction in the form in which it was prepared and asked.

It is also contended the court erred in admitting in evidence three letters purporting to be from Hughes to Richard H. Pleasants, a distant relative and friend residing in Baltimore, and two letters from Pleasants to Hughes. It is not claimed by proponents that any of the letters purporting to be from Hughes to Pleasants were in Hughes' handwriting. Hughes was practically blind when they were written and was unable to read or write. There was proof that Mrs. Cornish did his writing and that he would dictate to her and she would write it in longhand. All of the Hughes letters were written by Mrs. Cornish, and in addition to subscribing Hughes' name to them, her own name is subscribed as the writer of them. It was not shown that Hughes did, in fact, dictate the letters purporting to be written by him or that their contents were ever read to him. Pleasants testified to writing the two letters to Hughes, but it was not shown that Hughes ever received them or that they were read to him. It is contended that his receipt of them is to be inferred from the fact they were found among his effects in his room after his death. The proof discloses that the mail addressed to Hughes was received by Mrs. Cornish, and that at least part of the time she would not get the mail from the place it was delivered by

the carrier until she was leaving Hughes for the day, when she would get the mail and take it away with her. We are of opinion the letters should not have been admitted in evidence. The letters purporting to have been written by Hughes consist in large part of description of his helpless physical condition, his unfriendliness toward the nephew and niece to whom he gave nothing, and his friendship for and appreciation of Mrs. Cornish and his purpose to provide for her. Under all the circumstances the letters should not have been admitted.

The judgment of the Appellate Court and the decree of the circuit court are reversed and the cause remanded to the circuit court.

Reversed and remanded.

(No. 12757.—Reversed and remanded.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. ZEBEDEE STONEKING *et al.* Plaintiffs in Error.

Opinion filed October 27, 1919.

1. CRIMINAL LAW—*when a judgment of conviction will be reversed on evidence.* While a reviewing court must give due weight and importance to the verdict of the jury, yet where the evidence fails to establish guilt beyond a reasonable doubt it is the duty of a reviewing court to reverse a judgment of conviction.

2. SAME—*record should be free from error where evidence is close.* Where the evidence tending to establish the guilt of the defendant in a criminal case is close, the record should be free from substantial error.

3. SAME—*when it is imperative that the jury be accurately instructed.* Where the evidence of guilt is not such that all honest minds of ordinary intelligence must necessarily come to the same conclusion, the accused is entitled to have the jury instructed with substantial accuracy.

4. SAME—*instruction that defense of alibi merely creates a reasonable doubt is improper.* An instruction implying, as a general proposition, that the defense of *alibi* tends merely to cast a reasonable doubt upon the case made by the prosecution is improper, as that defense controverts the guilt of the defendant and when satisfactorily established is conclusive of his innocence.

WRIT OF ERROR to the Circuit Court of McDonough county; the Hon. HARRY M. WAGGONER, Judge, presiding.

MILLER & WALKER, for plaintiffs in error.

EDWARD J. BRUNDAGE, Attorney General, ANDREW L. HAINLINE, State's Attorney, and ALBERT D. RODENBERG, (JOHN E. LAWYER, of counsel,) for the People.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

Zebedee Stoneking and Robert Stoneking were convicted in the circuit court of McDonough county of the crime of burglary and were sentenced to the penitentiary. They urge a reversal of this judgment on the grounds that the evidence does not show them guilty of the crime beyond a reasonable doubt and that the court erred in the giving and refusing of instructions.

There are two uncontroverted facts in the record. The one is, that about two o'clock on the morning of July 3, 1918, the chicken house of James Wright was entered and six chickens stolen therefrom; and the second is, that about three o'clock on the same morning a Ford automobile belonging to Zebedee Stoneking was found in the highway about sixty rods north of Wright's house. The question of fact presented is, who entered Wright's chicken house? Furthermore, if the party or parties who entered the chicken house abandoned the automobile in the highway, then the question is, who drove the automobile there?

James Wright lived on a farm about seven miles southeast of the city of Macomb. He was awakened some time before two o'clock on the morning of July 3, 1918, by the squawking of chickens. He got up and looked out of the window in the direction of the chicken house and by the light of the moon he saw a man coming out of the chicken house with a sack. He and his hired hand, Lloyd Snyder,

went out to the barn lot and saw a man flash a light into a shed near by. Snyder brought the shotgun and Wright fired a shot and they heard the thief or thieves running away. They found the sack which had been dropped by the thief and it contained six chickens. The sack was one of three that had been hanging in Wright's barn and was tied with a strip torn from an old jacket hanging near the sacks. Wright saw one man when he looked from his bedroom window and he saw one man when the light was flashed in the shed. Snyder did not see anyone but he heard the running, and said that it sounded to him as if two men were running. Neither Wright nor Snyder followed up the party or parties who were running away and did not see any more of them. Wright telephoned the sheriff, James Barclay, and he came out from Macomb, arriving near Wright's farm about three o'clock A. M. It was he who discovered the Ford automobile standing in the highway, about sixty rods north of Wright's house. He inspected the car and made a memorandum of the license number and then went to Wright's house and was there for more than an hour. Wright did not tell the sheriff whom he had seen stealing his chickens. When the sheriff returned to his office he consulted the list of licensed automobiles furnished by the Secretary of State and learned that the automobile standing in the highway north of Wright's farm was the property of Zebedee Stoneking. He drove to the Stoneking home and inquired for Zebedee. The latter came to the door barefooted and dressed only in his shirt and overalls. When asked by the sheriff where his car was, he turned and looked in the direction of a tree under which he was accustomed to leave his car and said, "My car is gone, isn't it?" Upon further inquiry he learned that the sheriff had located his car at the Wright farm, and shortly afterwards he secured a car and drove out to the farm and got his car. Wright went to town that morning and in the afternoon caused a warrant to be is-

sued for the arrest of Zebedee Stoneking and his brother, Robert Stoneking, for this offense.

The defendants have at all times maintained that they drove to Good Hope, a village about eight miles north of Macomb, during the early part of the evening of July 2 and that they reached home about midnight; that they drove the car into the yard under the tree where they were in the habit of leaving it and went to bed. They so testified at the trial. On behalf of defendants, Daisy Marshall, a neighbor, testified that she saw them pass under the street light and drive into their mother's yard at about twelve o'clock. She fixed the time by the fact that she was returning from the home of her brother-in-law, where she had participated in a joint birthday party for him and her little daughter. Mary Stoneking, the mother of defendants, testified that she heard the boys come in just before twelve o'clock and heard them talking in their bed-room. On behalf of the People, Myrtle Brown, William Carstens and William Rhoades, all close neighbors of the Stonekings, testified that they could always hear the car when it was running but that on this night they did not hear the car come in nor go out of the yard. Defendants insist that they left the car in the yard at midnight, and that some time between that hour and three o'clock in the morning the car was stolen and driven to the point near Wright's home. This is substantially all of the evidence that was received on the trial.

It will be seen that there is no evidence in the record connecting Robert Stoneking with this burglary, and that the only evidence in the record connecting Zebedee Stoneking with the burglary is the fact that his car was found in the highway, within sixty rods of the scene of the burglary, within an hour after the burglary was committed. There is also the statement of Wright to the effect that he thinks Zebedee Stoneking is the man he saw coming from his chicken house, but he admits that this impression was

fixed in his mind after he learned that the deserted automobile belonged to Zebedee Stoneking.

A reviewing court should give due weight and importance to the verdict of the jury, and judgments of conviction will not be reversed simply because the evidence is conflicting. Where, however, the whole evidence considered, it fails to establish guilt beyond a reasonable doubt it is the duty of a reviewing court to reverse the judgment. (*People v. Freeland*, 284 Ill. 190.) The opportunity of seeing the witnesses when they testify peculiarly fits the jury to decide controverted questions of fact. We recognize that the conduct and demeanor of a witness on the stand and his action under cross-examination have a strong bearing upon the weight to be accorded his testimony. We will not set aside a verdict of guilty in a criminal case unless the testimony is palpably against the weight of the evidence or harmful error in the ruling of the court has taken place on the trial. But where the evidence is close, as it is in this case, the record should be free from substantial error. (*People v. Cassidy*, 283 Ill. 398.) Where the evidence is so overwhelmingly against the defendant that, regardless of the error in instructions, the jury must necessarily find the defendant guilty, we will decline to reverse for mere error of instruction, but where the evidence of guilt is not such that all honest minds of ordinary intelligence must necessarily come to the same conclusion after proper consideration, the accused is entitled to have it passed upon by a jury instructed with substantial accuracy as to the law applicable to the case. *People v. Pezutto*, 255 Ill. 583.

Complaint is made of the giving of the following instruction:

"The court instructs the jury, as a matter of law, that where the People make out such a case as would sustain a verdict of guilty, and the defendants offer evidence, the burden is on them to make out that defense, and as to an

alibi and all other like defenses that tend merely to cast a reasonable doubt on the case made by the People when the proof is in, then the primary question is, the whole evidence being considered, both that given for the defendants and for the People, are the defendants guilty beyond a reasonable doubt? The law being that when the jury have considered all the evidence, as well that touching the question of the *alibi* as the criminating evidence introduced by the prosecution, then, if they have any reasonable doubt of the guilt of the accused of the offense with which they stand charged, then they should acquit, otherwise not."

This is the identical instruction discussed and criticised in *Ackerson v. People*, 124 Ill. 563. We there held that it is not true, as a general or a legal proposition, that the defense of *alibi* tends merely to cast a reasonable doubt upon the case made by the People. That may, and will in many cases, be the only effect of the evidence produced to sustain the *alibi*. But the defense of *alibi* controverts the guilt of the defendant, and if certainly and satisfactorily established would be conclusive of the defendant's innocence. While in theory it does not deny that the crime has been committed, it asserts that the defendant, during the whole of the time in which the crime is shown to have been committed, was so far removed from the place of its commission that he could not have participated in its perpetration. (*Miller v. People*, 39 Ill. 457.) Such has been the holding of this court for more than fifty years. An instruction in all respects like the one in question was again condemned in *Sheehan v. People*, 131 Ill. 22. Again in *People v. Lukoszus*, 242 Ill. 101, we held that the giving of this instruction was error, and said that after defects in an instruction have been pointed out it should not be given, although it may not have been considered ground for reversing a judgment in the particular case. In spite of the repeated holdings of this court the same instruction was again presented in *People v. Blair*, 266 Ill. 70, and we

there said: "Although it is possible that an antidote may be found elsewhere for a hurtful statement which is not the law, an instruction repeatedly condemned by this court should not be given." This case does not present the problem of deciding who tells the truth when the testimony of one set of witnesses contradicts the other. The jury might have disbelieved the defendants and their mother, Mary Stoneking, and their neighbor, Daisy Marshall, as against testimony for the People positively disputing their statements, but the People have presented no such testimony. There is no material conflict in the evidence. Everything testified to by the witnesses for the People may be true and yet not show the testimony of the defendants and their witnesses to be untrue. The fact that the neighbors did not hear this car come in nor go out of the yard does not prove that it was not driven in nor that it was not pushed or driven out. Taking every statement of the People's witnesses to be true, there is no evidence in the record connecting Robert Stoneking with this burglary and the evidence is exceedingly close to sustain a conviction of Zeb-dee Stoneking. In view of the character of the evidence we do not think that the insertion of the last sentence in this instruction, nor the rule that the instructions should be taken as a series, neutralizes the harm that may have been done by that portion of the instruction which has been so repeatedly condemned by this court. The giving of this instruction was reversible error.

Objections are urged to the giving of other instructions for the People and for refusing and modifying instructions offered by the defendants, but in view of our holding we do not consider it important to discuss these objections.

The judgment of the circuit court will be reversed and the cause remanded.

Reversed and remanded.

(No. 12749.—Reversed and remanded.)

THE SPRING VALLEY COAL COMPANY, Plaintiff in Error,
vs. THE INDUSTRIAL COMMISSION *et al.*—(PETER SABATINI, Defendant in Error.)

Opinion filed October 27, 1919.

1. WORKMEN'S COMPENSATION—*an applicant must prove loss of sight was caused by injury complained of.* An applicant who seeks to recover an award for the subsequent loss of sight of an eye after having received an injury in the course of his employment must prove that the loss of sight was caused by the injury complained of.

2. SAME—*courts cannot determine the weight of evidence on controverted questions of fact.* The courts cannot determine the weight of the evidence on controverted questions of fact but can examine the record only to determine whether there is competent evidence to sustain the award.

3. SAME—*value of applicant's testimony as to previous condition of his eye.* In a proceeding to recover compensation for the total loss of sight of an eye, where the issue is whether the blindness was caused by disease or was caused entirely by the injury complained of, the testimony of the injured employee that he never had any trouble with the eye before the accident must be accepted as true, in the sense that he never knew that there was anything wrong with it.

4. SAME—*compensation cannot be awarded for total loss of eye if blindness is caused by pre-existing disease.* Although an employee's injured eye may not have been perfect, if he has always had normal use of it and the sight is lost as a result of the accident he is entitled to full compensation, but if he has a pre-existing progressive disease from which blindness ensues, and would have ensued regardless of the accident, compensation may be had only for the partial loss of vision caused by the injury.

WRIT OF ERROR to the Circuit Court of Bureau county;
the Hon. JOE A. DAVIS, Judge, presiding.

JOHN J. SHERLOCK, and McDUGALL, CHAPMAN &
BAYNE, for plaintiff in error.

HENSON, GILBERT & HELMICK, for defendant in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court :

On Saturday, August 25, 1917, Peter Sabatini was employed by the plaintiff in error, the Spring Valley Coal Company, in its coal mine at Spring Valley, in Bureau county, and about eleven o'clock of that day a piece of rock or coal struck him in the right eye. He continued to work through the day but when he went home at night he washed his eye. On the following Monday morning he reported his injury to the pit-boss, who gave him an order to a doctor for treatment, and the doctor sent him to an eye specialist at LaSalle. The eye specialist treated the eye until September 8, when he told Sabatini to report to the doctor to whom the pit-boss sent him and that he thought he was able to go back to work. The sight of the eye did not improve and it was treated by an oculist at Ottawa, but the sight was entirely lost. On November 22, 1917, an application was made for compensation under the Workmen's Compensation act, and on a hearing an award was made by the arbitrator, which was confirmed by the Industrial Commission. The record was taken before the circuit court of Bureau county by writ of *certiorari*, and the writ was quashed and the order of the Industrial Commission confirmed. The court certified that the cause was one proper to be considered by this court, and a writ of error was sued out accordingly.

The only controversy is concerning the amount of the award, depending upon the question whether the total loss of sight was due to the accident.

By paragraph (e) of section 8 of the Workmen's Compensation act the compensation for loss of the sight of an eye is fifty per cent of the average weekly wage during 100 weeks, and for a permanent partial loss of an eye fifty per cent of the average weekly wage for that proportion of the number of weeks provided for the total loss which

the partial loss bears to a total loss. Paragraph (j) provides for an increase of five percentum for each child under sixteen years of age until the percentum shall reach a maximum of sixty-five percentum, and Sabatini was married and had three children under sixteen years of age. The award was for \$11.46, which was sixty-five per cent of the average weekly wage of Sabatini, for 100 weeks, and if the total loss of sight of the eye was the result of the accident the award was right. If the total loss of sight was not caused by the accident but it caused a part of such loss, then Sabatini was entitled to \$11.46 during a number of weeks in the proportion that the partial loss bore to the total loss.

It was incumbent on the applicant to prove that his loss of sight was caused by the accident. (*Chicago and Alton Railroad Co. v. Industrial Board*, 274 Ill. 336; *Albaugh-Dover Co. v. Industrial Board*, 278 id. 179; *Ohio Building Safety Vault Co. v. Industrial Board*, 277 id. 96; *Northern Illinois Traction Co. v. Industrial Board*, 279 id. 565; *Peterson & Co. v. Industrial Board*, 281 id. 326.) The courts cannot determine the weight of the evidence on controverted questions of fact but can examine the record only to determine whether there is competent evidence to sustain the award. (*Pekin Cooperage Co. v. Industrial Com.* 285 Ill. 31; *Sulzberger & Sons Co. v. Industrial Com.* id. 223; *Western Electric Co. v. Industrial Com.* id. 279; *Lefens v. Industrial Com.* 286 id. 32; *Heed v. Industrial Com.* 287 id. 505.) The question here, therefore, is whether there is any competent evidence in the record sustaining the conclusion of the Industrial Commission that the total loss of sight of the eye was due to the accident.

Sabatini testified that he never had any trouble with the eye before the accident; that after the accident it became inflamed, and when he went to the eye specialist he could not see because he could not keep the eye open; that while he was being treated it got better and he could see a little

bit and afterward could see nothing. The eye specialist testified that when Sabatini came to him he had an infected ulcer of the cornea, caused by the piece of rock or coal; that the eye was inflamed, with pus in the ulcer; that the foreign body caused an external infection but not in the internal section of the eye; that there was no perforation of the eye from the injury; that he treated the ulcer antiseptically and it healed up leaving a scar, which caused thirty-five per cent of loss of vision; that when he discharged Sabatini he made examinations of the eye to determine the loss of vision; that he found the scar covered about a fourth of the pupillary of the eye, causing a loss of about thirty-five per cent of vision; that in the interior of the eye he found choroiditis, which had nothing to do with the injury; that in the first stage of choroiditis there is acuteness and in the later stage it becomes atrophic, and he found atrophic patches in the choroid; that there was no connection between the blow on the eye and the loss of sight except as to thirty-five per cent due to the scar, and that Sabatini would have gone blind anyway in the same length of time. An oculist of thirty-two years' practice testified that he examined Sabatini about December 5, 1917, and found a superficial injury resulting in an ulcer and leaving a scar, and that the total loss of vision had no connection whatever with that injury except as to a percentage. The witness tested the eye at the hearing and found that there was no vision, but testified that choroiditis is an inflammation of the choroid, which is the middle layer of the wall of the eye-ball; that the ulcer, which did not perforate into the cornea, could not possibly make a man become blind in two weeks; that choroiditis is progressive and is acute and chronic and subacute, and loss of vision might become complete in two weeks.

Sabatini's testimony that he never had any trouble with the eye before the accident must be accepted as true in the sense that he never knew that there was anything wrong

with it. Although the eye may not have been perfect, if he always had normal use of it and the sight was lost as a result of the accident he would be entitled to full compensation. (*Mark Manf. Co. v. Industrial Com.* 286 Ill. 620.) If, on the other hand, he had a pre-existing disease known as choroiditis, which was progressive and from which blindness was certain to ensue, and the accident caused only a partial loss of vision, the statute provides a different measure of compensation. There was no contradiction of the testimony that he had choroiditis, which would cause blindness, and that the superficial scar resulting from the accident could not cause blindness but only a partial loss of vision due to the interference of the scar. In the present state of the record it must be held that the total loss of vision was not due to the accident. There is no evidence whether choroiditis is of such a nature that Sabatini would have been aware of its existence up to the time of the accident if he had it. For aught that appears he may have been afflicted by the disease, which would soon cause total blindness, and yet never have had any trouble with the eye. If a further hearing should be had the evidence may justify a different conclusion, but the evidence on the hearing which was had does not sustain the award for permanent total loss of the eye as a result of the accident.

The judgment of the circuit court is reversed and the cause remanded to that court, with directions to remand the application to the Industrial Commission for a correction of the award in harmony with the views herein expressed or for a further hearing as to the question considered in this opinion, if such further hearing should be desired.

Reversed and remanded, with directions.

(No. 12368.—Reversed and remanded.)

NANNIE MILES, Plaintiff in Error, *vs.* THE INTERNATIONAL HOTEL COMPANY, Defendant in Error.

Opinion filed October 27, 1919.

1. **BAILMENTS**—*when innkeeper is gratuitous bailee.* Where a boarder pays her bill upon leaving a hotel, and, according to her testimony, leaves her trunk for storage with the consent of the hotel keeper but without taking a check for it, the hotel keeper is a gratuitous bailee of the trunk, and the inducement of having the boarder return to the hotel is not such compensation as will make the bailment one of hire.

2. **SAME**—*degree of care required of a gratuitous bailee.* A gratuitous bailee is bound to take such care in the preservation of the property intrusted to him as every prudent man takes of his own goods of like character.

3. **SAME**—*what is meant by ordinary diligence.* Ordinary diligence means that degree of care, attention or exertion which, under the circumstances, a man of ordinary prudence and discretion would use in reference to the particular thing were it his own property.

4. **SAME**—*bailor must prove negligence of the bailee.* Although the bailor, by showing that the goods were received in good condition and not returned by the bailee, makes out a *prima facie* case, if the bailee offers evidence tending to show that he was not negligent the burden is still on the bailor to show that the bailee was, in fact, negligent and that his negligence caused the loss or contributed thereto.

5. **APPEALS AND ERRORS**—*when Appellate Court should recite finding of facts in its judgment.* Under section 120 of the Practice act, when the judgment of the trial court is reversed in the Appellate Court on a question of fact the ultimate facts found by the Appellate Court must be recited in the final judgment of that court, but if the judgment of the trial court is reversed for errors of law the Appellate Court should remand the case for another trial.

WRIT OF ERROR to the Second Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. CLINTON F. IRWIN, Judge, presiding.

THOMAS D. NASH, and MICHAEL J. AHERN, for plaintiff in error.

A. G. DICUS, for defendant in error.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

This cause is brought to this court by *certiorari* to review a judgment of the Appellate Court for the First District reversing a judgment of the superior court for \$1097 in favor of Nannie Miles and against the International Hotel Company, proprietor of the Kaiserhof Hotel, in the city of Chicago. The judgment is for the value of a trunk and its contents claimed by plaintiff in error to have been lost by defendant in error.

According to the testimony of the plaintiff in error she came to the Kaiserhof Hotel on November 30, 1904, and registered as a guest of the hotel. She asked for special terms and was assigned room 301 at a dollar a day. She brought with her a trunk, suit-case and a parrot in a cage and stayed six months. When she went away, May 29, 1905, she called a bell-boy and requested him to ascertain if she could leave her trunk and what the charges would be. He inquired of the clerk and reported to her that they would gladly take care of her trunk and that there would be no charges. She first spoke to Miss Burke, the housekeeper, about leaving her trunk, and Miss Burke told her to make arrangements with the head porter. She had no conversation with the porter until her return, in March, 1906. Upon her return she registered and asked to have her trunk sent up. The next day she inquired of the porter why the trunk had not been sent up, and he said that it was Saturday and therefore a very busy day, but he assured her that he would send it up. On Monday she inquired about her trunk, and the head porter told her that in making some alterations in the building he thought perhaps her trunk had been misplaced. On Tuesday she complained to Max Teich, one of the managers, regarding her

trunk, and he asked her if she had a check for it, and she replied that she had not because she left hurriedly and did not ask for a check. Teich went over the building with her, searching for the trunk. There was a trunk standing outside the linen room which trunk resembled hers, but it belonged to the assistant housekeeper. She further testified that Teich told her that Miss Nelson, the cashier, remembered that she had put the duplicate check in an envelope, sealed it and put it in the safe and had given the porter the corresponding check; that Teich held a check in his hand while he was telling her this, but he did not let her see it; that Teich told her that Miss Burke told him that Mr. Clark took the trunk from her room. The parrot cage was found in the baggage room. She described the trunk as one with an oval top, covered with imitation leather, and as being three and a half feet long, three feet high in the middle and two and a half feet wide, and of the value of \$14. She further testified that this trunk contained the following articles and fixed the values set opposite each article: Black silk waist, \$10; white silk waist, \$5; waist pattern, \$4; silk lace waist, \$18; blue silk waist, \$13.60; two tailor-made dress skirts, \$25; broadcloth wrap, \$32; silk and wool shawl, \$28; three-piece tailored suit, \$39.50; two silk crepe shawls, \$24; sealskin coat, \$380; black silk tea gown, \$27; wool tea gown, \$17; twelve yards clay suiting, \$42; fifty yards black silk, \$125; nine yards blue silk, \$40.50; eighteen yards brown silk taffeta, \$18; three bolts white silk lace, \$36; six yards black lace, \$6; two bolts linen lace, \$6; six yards Axminster trimming, \$7.50; one dozen jade ornaments, \$7.20; three yards black silk velvet, \$15; three bolts black grosgrain ribbon, \$14.40; twelve yards lawn, \$4.80; two tablecloths, \$7; two dozen napkins, \$4.50; bed-spread, \$6; violin bow, \$4; piece of fancywork, \$37; two brushes, \$2; silk table scarf, \$12; pair of steel glasses, \$12; shoes, \$4; slippers, \$3; silk petticoat, \$12; silk velvet hat, \$12; eighteen buttons, \$18;

tortoise shell purse, \$7.50; sword, \$5; hair switch, \$7. The sealskin coat was bought by her husband in 1879 and was twenty-four years old when she left it at the Kaiserhof Hotel. She fixed the above value because at one time a furrier told her it was worth \$300 and she paid him \$80 to remodel it, and it was therefore worth \$380. The clay suiting was procured by her from her husband's store when he closed out his tailoring business. It was six or eight years old at the time she left it in the trunk. She fixed the market value of this suiting at \$42 because she saw the ticket on the goods. The fifty yards of black silk, the twelve yards of silk lace, the eleven bolts of linen net lace, the bolt of insertion, the three bolts of ribbon and the silk hat-brush were all given to her when her husband closed out his drygoods store, in 1884. The violin bow was fifteen years old. The trunk was twelve years old. She further testified that she paid the book-keeper at the office about two o'clock in the afternoon but did not tell her about leaving the trunk because she was not sure that she was going that day. She had formerly conducted the Oneida Hotel, at Indianapolis, Indiana, and was familiar with the rules and regulations of hotels. She had been in a good many hotels and had left trunks but had never before left a trunk at a hotel without getting a check for it. She talked to no one about going away except the bell-boy. She left at seven o'clock P. M. There was a card hanging on the door of her room which stated that "all baggage and property of guests left with us in storage will receive our best attention, for which no charge will be made, but in case of accident by fire or water or damage of any kind it will be at the risk of the owner."

On behalf of the defendant in error Anna Burke testified that she had been the housekeeper for twenty-three years; that she knew the plaintiff in error and saw a parrot cage with a bird in it in her room and also an old trunk; that the plaintiff in error wore a wrapper about the hotel

and when she went out she wore a waist and skirt; that her trunk was invariably open, but that she never saw any silks or broadcloth or lace or bolts of goods in or around her trunk; that she saw her sealskin coat when she left it in the parlor and a watchman was taking it to the linen room; that it was worn on the sleeves and on the collar where the neck rubs against it, and was faded.

William Licht testified that he was the clerk who received Mrs. Miles and saw her make arrangements with Teich for a weekly rate; that Mrs. Miles paid him when she left, after six o'clock on the evening of May 29, 1905, and that she said nothing to him about her trunk; that the first he heard of the trunk was about a year later; that defendant in error had checks which were issued when baggage was left in charge of the hotel; that one check was fastened to the trunk and one check was given to the guest; that the baggage room was in the basement and was in charge of the head porter; that there had never been any complaints of loss of trunks or baggage; that all the porters and watchmen were reliable, capable employees, and that there had never been complaint of their work or of anything lost when intrusted to their care.

Miss Mary Burke, who had charge of the linen room, testified that she never saw Mrs. Miles wear any silks or satins but that she wore a dark skirt and white waist; that she often saw the sealskin coat hanging on the back of a chair in her room and that it was a very old coat; that she never saw any bolts of silk or dress goods in her room; that her trunk was a zinc trunk with an oval top, and that it was invariably open; that when Mrs. Miles was looking for her trunk with Teich she pointed out the trunk of the witness and said that it looked like hers but that the trunk of the witness was somewhat larger than that of plaintiff in error.

Augustina Korb (formerly Nelson) was the cashier and book-keeper at the hotel at the time Mrs. Miles lived there.

She testified that she did not tell Teich that she had taken a check and put it in an envelope with Mrs. Miles' name on it and put the envelope in a safe; that she did not place a check in an envelope for Mrs. Miles; that she never saw an envelope or check that was marked for Mrs. Miles; that she did not receive any pay from Mrs. Miles on the day she left; that the handwriting in the cash book showed that it was received by Licht, and that she never had any conversation with her with reference to leaving her trunk at the hotel.

Max Teich, treasurer and one of the managers of the hotel, testified that he was in the hotel November 30, 1904, when Mrs. Miles came in; that she told him that she had been in the hotel business and wanted to stay some time in Chicago and wanted a special rate; that they selected room 301,—a \$1.50 room,—and made arrangements for her to stay at a special rate of \$7 a week; that he wrote her name on the register; that she stayed until May 29, 1905, and in March, 1906, returned and came to him and wanted to get a trunk; that he asked her if she had a check, and she replied, "No;" that he asked her how she could leave a trunk without getting a check, and she replied that she left in a hurry; that she then asked him to help her make a search for it; that they made a search but found no trunk without a check, except one belonging to one of the porters; that he went with her to the linen room and there found a trunk which she said looked like her trunk but that her trunk was somewhat smaller than the one found; that he measured this trunk and found it to be two feet wide by three feet long and about two and one-half feet high; that they found the bird cage in the baggage room but it had no name or check on it; that he never told Mrs. Miles that Miss Nelson had told him that a check had been put in an envelope with Mrs. Miles' name on it and put in the safe; that there was no check in the safe; that the baggage room was kept locked and was in

charge of the head porter; that the porters were all competent and trustworthy men; that he had never received any complaints during the years 1904, 1905 or 1906 regarding the honesty or competency of any of the day or night porters or of the clerks or cashier; that all of his help was employed with care; that references were required and that inquiries were made before the help was employed; that no baggage could be left at his hotel without a check being issued for it, and that there had never been any baggage stored at his hotel, to his knowledge, without the guest taking a check for it; that all checks were in duplicate and that one was attached to the baggage and one was given to the guest; that the checks had on them the name of the hotel and a number; that if Mrs. Miles took her trunk with her on the cab when she went to the depot no check would figure in the transaction; that the porter would then take the trunk down and place it on the cab with her and she would go away with it; that he did not have any check in his hand at any time when he was with Mrs. Miles looking for her trunk.

John Murray testified that he was head porter at the Kaiserhof and that he had charge of the baggage room in the hotel; that Mrs. Miles did not leave any trunk with him or any of his assistants when she left on the 29th of May, 1905; that she did not say anything to him about leaving a trunk and that no trunk of hers ever came to the baggage room; that he did not tell Mrs. Miles that her trunk had been misplaced; that in March, 1906, when she complained of the loss of her trunk, he asked for a description of it, and that she at first refused to give it but later gave him such a description; that there was a bird cage in the baggage room and that he knew it belonged to Mrs. Miles.

Richard R. Miles testified that he was the former husband of Mrs. Miles; that they were divorced ten years before; that she had but one sealskin coat, and that he bought

it for her from L. S. Ayres & Co. in 1879 and paid \$288 for it; that he sold out his drygoods business in 1884 and that she took a lot of stuff out of the store at the time.

This is substantially all of the testimony that was received in this cause. The briefs filed in the cause afford little assistance in determining the real legal points involved.

It is not necessary to determine whether or not plaintiff in error was a guest or a mere lodger or boarder, because the relation terminated when the bill was paid and she left the hotel. The question presented, therefore, is that of the liability of an ordinary bailee. At least some of the terms of the bailment were fixed by the notice which was posted by defendant in error in the room of plaintiff in error. This notice informed plaintiff in error that property left with defendant in error for storage would receive its best attention, which attention could not mean less than ordinary care. This was a gratuitous bailment, even though it may be said that the contract of bailment entered into was done partly as an inducement to plaintiff in error to return to the hotel as a boarder. Such incidental advantage is not such compensation as is necessary to make the bailment one of hire. (*Bennett v. O'Brien*, 37 Ill. 250.) A gratuitous bailee of property is bound to take reasonable care to protect it from loss or damage. As bailee the defendant in error was bound to exercise such care and diligence in the preservation of the property intrusted to it as every prudent man takes of his own goods of like character. Ordinary diligence means that degree of care, attention or exertion which under the circumstances a man of ordinary prudence and discretion would use in reference to the particular thing were it his own property. (*Schaefer v. Safety Deposit Co.* 281 Ill. 43.) The weight of modern authority holds the rule to be that where the bailor has shown that the goods were received in good condition by the bailee and were not returned to the bailor on demand the bailor has made out a case of *prima facie*

negligence against the bailee, and the bailee must show that the loss or damage was caused without his fault. (*Cumins v. Wood*, 44 Ill. 416; *Schaefer v. Safety Deposit Co. supra.*) The effect of this rule is, not to shift the burden of proof from plaintiff to the defendant but simply the burden of proceeding. The bailor must in all instances prove that the bailee was negligent, but when she shows that the goods which she intrusted to the bailee's care were not delivered upon demand she has made out a *prima facie* case or created a presumption of negligence which the bailee may overcome by offering evidence to show that it was not negligent, and if it produces such evidence, the bailor, in order to make out her case, must show that the bailee was, in fact, negligent and that its negligence caused the loss or contributed thereto. It was held in *Sanborn v. Kimball*, 106 Me. 355, that the bailee has sufficiently exonerated himself from liability when he has shown that the cause of the loss was a mystery. In this case it is admitted by plaintiff in error that she did not get a check for her trunk and that she was away for a year, and during all that time she did not write to the defendant in error and advise it that she had left a trunk there and that she had left hurriedly and did not get a check for it. At least reasonable prudence on her part would demand that she furnish some information to the defendant in error regarding the baggage. The gratuitous bailee, where the bailment was for the benefit of the bailor, would be required to exercise no more care in keeping a piece of property for the bailor than it would exercise in the care of its own property of equal value. It cannot be presumed that defendant in error would expect an old trunk of the size of the one here in controversy, with its contents, to be worth over a thousand dollars. Plaintiff in error had the burden of showing what property she delivered to defendant in error and the value of this property. After she established her *prima facie* case, then the duty of defendant in error was

to show that it was not negligent in keeping this property, if it was ever intrusted to its care. Defendant in error insists that it never received this trunk for storage, and there is absolutely no evidence to show that it did so receive it, excepting the statement of plaintiff in error that she told a bell-boy that she wanted it placed in storage.

Defendant in error showed that it employed competent and trustworthy help to handle the baggage of its guests, and showed that it had a safe place in which to keep baggage if it was intrusted to its care. Under the circumstances shown by the evidence in this case it could not show more. There is no evidence whatever in the record that the employees of defendant in error were not competent and trustworthy employees, and yet the jury found, in answer to special interrogatories submitted to them, that the hotel did not employ competent or trustworthy employees. There is no evidence in the record to sustain such a finding.

While plaintiff in error makes no objection to the form of judgment entered by the Appellate Court, it is apparent from a reading of the opinion of the Appellate Court that the judgment of the superior court was reversed because the Appellate Court found the facts to be different from the facts found by the superior court. Section 120 of the Practice act, which provides for the Appellate Court reversing the trial court as the result, wholly or in part, of a finding of facts different from the finding of the trial court, makes it the duty of the Appellate Court to recite in its final judgment the facts as found. When the judgment of the trial court is reversed on a question of fact the ultimate facts found by the Appellate Court must be recited in the final judgment of that court. *Delta Bag Co. v. Kearns*, 253 Ill. 365.

The judgment of the Appellate Court is therefore reversed and the cause remanded to that court, with directions to recite the facts in its final order upon which the judgment of reversal is predicated, and if it shall still be of the opin-

ion that the final judgment should be entered in that court, to so enter it. If, however, said court reverses the judgment of the superior court for errors of law the Appellate Court will remand the case to the superior court for another trial. Leave is granted to withdraw the record filed here for the purpose of re-filing it in the Appellate Court.

Reversed and remanded, with directions.

(No. 12513.—Reversed and remanded.)

THE PEABODY COAL COMPANY, Defendant in Error, vs.
THE INDUSTRIAL COMMISSION *et al.*—(JOHN J. BULLINGTON, Admr. Plaintiff in Error.)

Opinion filed October 27, 1919.

1. WORKMEN'S COMPENSATION—*claimant has burden of proving deceased's contributions for support.* Under paragraph (b) of section 7 of the Compensation act of 1915 providing for the payment of an award to beneficiaries to whose support the deceased employee had contributed, the burden is on the claimant to prove the elements necessary to bring the beneficiary within the provisions of the act.

2. SAME—*surviving parent need not have been dependent upon deceased employee.* Paragraph (b) of section 7 of the Compensation act of 1915 does not require that the surviving parent shall have been dependent upon the deceased employee, but it is sufficient if the deceased leaves a parent to whose support he has contributed within four years immediately prior to the injury.

3. SAME—*when there is no presumption that payment was for support of parent.* On evidence that an employee within four years previous to the injury which resulted in his death had made two payments to his aged father, sending him \$45 at one time and \$44 at another, no legal presumption can arise that the payments were made to assist in the father's support rather than to pay an ordinary debt for services rendered or for money loaned. (*Victor Chemical Works v. Industrial Board*, 274 Ill. 11, distinguished.)

4. SAME—*what two courses are open to circuit court on review of proceedings of Industrial Commission.* On review of proceedings of the Industrial Commission by *certiorari* the circuit court may either set aside the decision and enter such judgment upon the facts as is justified and required by law, or remand the cause to the commission for further proceedings.

5. *SAME*—when circuit court should remand cause to Industrial Commission. If the facts in the record before the circuit court do not justify an award, but it does not appear from the facts shown that the claimant cannot, under the law, establish his case by further competent proof, the circuit court should remand the cause to the Industrial Commission.

6. *EVIDENCE*—*presumption as to payment of money is one of fact*. The presumption as to whether the payment of money is a gift or for an obligation is one of fact rather than of law and is an inference to be drawn from the facts of the particular case.

WRIT OF ERROR to the Circuit Court of Christian county; the Hon. J. C. McBRIDE, Judge, presiding.

A. W. KERR, and W. J. MacDONALD, for plaintiff in error.

BATES, HICKS & FOLONIE, and PROVINE & PROVINE, for defendant in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

The circuit court of Christian county, on motion of the Peabody Coal Company, quashed the record of the award made by the Industrial Commission in favor of plaintiff in error, John J. Bullington, administrator of the estate of Ambrosio Maero, deceased, for injuries received while in said company's employment. The trial judge certified that the cause was one proper to be reviewed by the Supreme Court.

It is stipulated in the record that Ambrosio Maero received an injury December 22, 1916, which resulted in his death; that the injury arose out of and in the course of his employment; that the employer had knowledge of the injury and that a claim for compensation for the injury was made as required by law; that both parties were operating under the provisions of the Workmen's Compensation act; that deceased at the time of the injury, and for more than a year prior thereto, had been in the employ of the

Peabody Coal Company as a loader in one of its coal mines in Christian county; that the mine operated 250 days and deceased worked 158 days during the year preceding the date of the accident, earning \$643.40.

Maero left him surviving no widow, child or children or descendants of a child or children but did leave him surviving his father, Joseph Maero, aged eighty-four years, and his mother, Mary Maero, aged seventy-five years, both residing at Brondel, Italy, and two adult brothers and two adult sisters. The circuit court quashed the record on the ground that it failed to show that the deceased contributed to the support of his parents within four years prior to the time of his injury. The Industrial Commission found that the deceased did contribute to such support during said four years and ordered the employer to pay the plaintiff in error \$7.50 a week for 416 weeks.

The sole question in issue in this case is whether or not there is any competent evidence in the record showing that the deceased, within four years prior to his death, contributed to the support of his parents, as found by the Industrial Commission. The evidence in the record upon which the commission based its finding is in substance as follows: Joseph Maero, who was a nephew of the deceased, testified that the deceased was thirty-two years of age at the time of his injury; that witness had known him as long as he could remember; that deceased came from Brondel, Italy, and witness had also lived there; that about three years ago deceased sent \$45 of his wages to his father and about a year prior to the accident he sent \$44; that these amounts were sent by post-office money orders from Granville, Illinois; that the witness was present in Italy when the parents received the first amount and was present in Granville when Maero sent the second amount and saw him send the money order; that witness found receipts for international money orders for these amounts in the trunk of the deceased after his death. He also testified

that the money thus sent was taken from the earnings of the deceased.

In this class of cases the claimant has the burden of proving the elements necessary to bring the beneficiary within the provisions of the Workmen's Compensation act. (*Chicago and Alton Railroad Co. v. Industrial Board*, 274 Ill. 336; *Ohio Building Vault Co. v. Industrial Board*, 277 id. 96.) Paragraph (b) of section 7 of the Workmen's Compensation act of 1915 provides: "If no amount is payable under paragraph (a) of this section and the employee leaves any widow, child, parent, grandparent or other lineal heir, to whose support he had contributed within four years previous to the time of his injury, a sum equal to four times the average annual earnings of the employee" shall be paid for an injury to the employee resulting in death. The act as thus worded was in force at the time of Maero's death. It does not require that the surviving parent shall be dependent upon the deceased, but it is sufficient if the deceased employee leaves a parent to whose support he has contributed within four years immediately prior to the injury. (*Commonwealth Edison Co. v. Industrial Board*, 277 Ill. 74.) In *Bromwell v. Estate of Bromwell*, 139 Ill. 424, it was stated (p. 426): "Where one pays money to another and there is no explanation of the cause of such payment the ordinary presumption is that the money was paid because it was due and owing and not by way of a loan. * * * This is undoubtedly the rule where only business relations exist between the parties, but where other relations exist there may, doubtless, be ground for presumptions of a different character. Thus, where a husband hands money to his wife, or a father to a child still dependent upon him, the presumption naturally arising is that the act is in performance of the legal obligation resting upon husband or father to maintain or support the wife or child." The presumption as to payment of money, as shown by the above decision, is one of fact rather than one of law,—a

mere rule of evidence,—an inference to be drawn from the facts and circumstances of the particular case.

We do not think that any legal presumption can be drawn from the fact of the payment to the father, eighty-four years old, by his son, thirty-two years old, that this payment was made to assist in the father's support rather than to pay an ordinary debt for services rendered or for money loaned. This case is different in its facts from *Victor Chemical Works v. Industrial Board*, 274 Ill. 11, relied upon by plaintiff in error as controlling. Each case must be decided according to its own special facts, and we think there the proof that the payments had gone for the support of the parents was more definite and positive than it is here. Under the statute the circuit court had two courses open to it on review of the proceedings by *certiorari*: either to set aside the decision and enter such decision upon the facts as is justified and required by law, or to remand the cause to the commission for further proceedings. In this case there are no sufficient facts in the record upon which any award or judgment can be based, but it does not appear from the facts that are shown that it will be impossible, under the law, for the claimant to establish his case by competent proof. The circuit court should have reversed the order and remanded the cause to the commission for further proceedings. Workmen's Compensation act, sec. 19, par. (f), clause 3; *Victor Chemical Works v. Industrial Board*, *supra*.

The judgment of the circuit court is reversed and the cause remanded, with directions to that court to remand the proceedings to the Industrial Commission for a further hearing.

Reversed and remanded, with directions.

(No. 12787.—Judgment affirmed.)

THE PEOPLE *ex rel.* The Township High School Board of Education *et al.* Appellants, *vs.* G. E. SWANSON *et al.* Appellees.

Opinion filed October 27, 1919.

1. SCHOOLS—*effect of the validating act of 1917 where township high school district has been organized under general School law.* Where, under the general School law, all the territory of a township is organized into a high school district before the passage of the validating act of 1917 and includes a part of the territory of a district previously organized under the invalid act of 1911, the validating act makes the latter district valid from the time of its organization and deprives the district organized under the general School law of its jurisdiction over the territory affected by the validating act.

2. SAME—*validity of organization not affected by a legislative change of boundaries.* The validity of the organization of a high school district consisting of one entire township is not affected by a subsequent legislative change of its boundaries, caused by taking certain sections from it and adding them to another district, even though the law would not have authorized the organization of a district out of territory embracing less than a township.

APPEAL from the Circuit Court of Henry county; the Hon. EMERY C. GRAVES, Judge, presiding.

CARL A. MELIN, State's Attorney, (ROBERT C. MORSE, and HENRY WATERMAN, of counsel,) for appellants.

CHARLES B. MARSHALL, and CHARLES D. MARSHALL, for appellees.

Mr. CHIEF JUSTICE DUNN delivered the opinion of the court:

Clover township and Oxford township, in Henry county, are adjoining townships, Clover township being east of Oxford. Each is a congressional township, consisting of thirty-six sections. In the spring of 1916 proceedings were taken under the act of 1911 for the organization of a high school district in a part of the territory of the two town-

ships, being four miles wide north and south and five miles long east and west, consisting of twelve sections in Clover township and eight sections in Oxford township, the south line of the district being the south line of the townships. A board of education was elected and organized and in September, 1916, a high school was opened, which was conducted during the next two school years eight and a half months in each year. After the decision of the case of *People v. Weis*, 275 Ill. 581, holding the act of 1911 unconstitutional, an information in the nature of *quo warranto* was filed in the circuit court of Henry county for the purpose of dissolving the district, but before judgment in that cause the validating act of June 14, 1917, was passed and the information was dismissed. In the meantime, in the spring of 1917, proceedings were taken under the general school laws for the organization of a township high school comprising all the territory of Oxford township, and before the passage of the act of 1917 a board of education was elected and organized which proceeded to establish a high school in Oxford township, which was opened in September, 1917, and conducted and maintained for eight and a half months during the following school year. The first school district was known as district No. 192, the last as district No. 193. District No. 192 levied a tax in August, 1916, which was collected. Both districts levied taxes in August, 1917, the result being that taxes were extended for the maintenance of a high school in both districts against the eight sections included in both districts. Anticipation warrants were drawn by each district against the taxes for the year 1917-18, which were sold to the banks and are still held by them. Neither of the districts has purchased or contracted for a site for a high school building, but each has conducted and maintained its high school in rented rooms owned by the local school districts. On June 10, 1918, the State's attorney of Henry county, on the relation of the board of education of district No. 193, filed an in-

formation in the nature of *quo warranto* against the members of the board of education of district No. 192, calling upon them to show by what authority they assumed to exercise the power and authority of a high school board of education over the lands and persons within the limits of the eight sections in Oxford township. A plea was filed, there was a trial by the court without a jury upon a stipulation as to the facts and a judgment was rendered in favor of defendants, from which relators have appealed.

The appellants contend that until the passage of the act of June 14, 1917, district No. 192 had no existence, either *de jure* or *de facto*; that district No. 193 came into existence as a *de jure* organization before the passage of that act; that district No. 192 was created by that act, but jurisdiction over the eight sections of land which were rightfully included within the limits of district No. 193 was not taken from that district and conferred upon district No. 192 by the act of 1917. Under the act of June 14, 1917, the territory in all cases to which it applied was declared legally and validly organized and established as a high school district; and not only so, but by section 2 all the acts of the persons elected and acting as a board of education, such as were authorized to be done by school districts or boards of education by the general school laws of the State, were declared to be legal and valid in all respects. Section 3 provided that whenever two such districts overlapped in territory, the district which was first established and continued to conduct a high school should be validated and confirmed. But this section is not material here, for there are no two such districts in this case. When district No. 193 was organized it rightfully acquired jurisdiction over the eight sections of land in controversy, for the unconstitutional act of 1911 conferred upon district No. 192 no rights in the district, either *de jure* or *de facto*. The effect of the act of June 14, 1917, which was passed a few days after the organization of district No. 193, was to make the election

valid for the establishment of a high school district in district No. 192 and the election of a board of education legal and valid, even to the extent of holding valid taxes levied before the passage of the curative act. (*People v. Matthews*, 282 Ill. 85; *Fisher v. Fay*, 288 id. 11.) In the latter case it is said that "there is not a suggestion anywhere in the constitution that the legislature cannot, by enactment, form and constitute any territory it may see fit into a school district and give to it corporate powers as such without any vote or consent of the people of that territory." Therefore it was not beyond the power of the legislature to detach the territory from district No. 193 and attach it to district No. 192. This was the effect of the act of the legislature. District No. 193 was legally organized, having jurisdiction over the territory in controversy. By the act of June 14, 1917, the legislature in effect declared that district No. 192 should be regarded as legally organized from the time of its attempted organization, including the territory in question, and that all its acts, such as are authorized to be done by school districts or boards of education by the general school laws of the State, were legal and valid in all respects. The effect was to deprive district No. 193 of jurisdiction over its territory and confer it on district No. 192, and it was within the power of the legislature to do this.

The appellants argue that the organization of district No. 193 depends upon its retaining these sections, because there is no law authorizing the creation of a township high school out of a part of one or more townships. The organization of district No. 193 was completed before the passage of the act of June 14, 1917. It would not become defective by reason of a legislative change in the boundaries of its territory.

The judgment is affirmed.

Judgment affirmed.

(No. 12734.—Reversed and remanded.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in
Error, vs. SAMUEL ADAMS, Plaintiff in Error.

Opinion filed October 27, 1919.

1. CRIMINAL LAW—*witnesses should testify to actual facts to prove criminal negligence.* On the trial of an automobile driver for criminal negligence the witnesses should testify to the actual facts, and they should not be permitted to give conclusions as to what could or could not have been done with safety under the circumstances.

2. SAME—*intent to kill is not necessary in manslaughter.* As manslaughter is defined by statute to be the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever, the intent to kill, or malice, is not a necessary ingredient in the crime.

3. SAME—*indictment for manslaughter may charge willful negligence.* An indictment charging involuntary manslaughter is not objectionable because it alleges the defendant unlawfully, feloniously and willfully did the act that caused the death.

4. SAME—*question of criminal negligence is one of fact for the jury.* Where the driver of an automobile is charged with manslaughter in the killing of a pedestrian, whether the defendant is guilty of culpable or criminal negligence is a question of fact for the jury to pass upon under instructions free from error or misleading statements as to the law.

5. SAME—*driver upon public highway must exercise reasonable care to prevent injury.* Every person who drives upon the public highway is under a legal duty to observe, in the control and management of his vehicle, the exercise of reasonable care to prevent injury to others.

6. SAME—*when negligence becomes criminal.* Criminal liability cannot be predicated upon every lawful act carelessly performed merely because such carelessness results in the death of someone, but negligence, to become criminal, must be reckless or wanton and of such a character as shows an utter disregard of the safety of others under circumstances likely to cause injury.

7. SAME—*what is improper in State's attorney's argument in the trial of driver of motor vehicle.* On the trial of the driver of a motor vehicle for criminal negligence the State's attorney in his argument should not direct the jury to consider what they have

read in newspapers concerning the recklessness of chauffeurs in general and their own observations as to the negligence of chauffeurs who drive machines for hire, as the defendant should be tried on his own conduct as determined by the evidence.

8. *SAME*—*when record should recite that it contains all the instructions given or evidence heard.* The refusal to give certain instructions cannot be considered as a matter affecting the judgment where the abstract does not show the instructions therein shown to be given are all the instructions that were given on the trial; nor can the question whether the evidence in the record is sufficient to support the judgment arise where the record does not recite that the evidence as disclosed by the abstract is all the evidence that was heard on the trial.

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. HENRY GUERIN, Judge, presiding.

FRANK R. REID, and CHARLES A. O'CONNOR, for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, MACLAY HOYNE, State's Attorney, and EDWARD C. FITCH, (EDWARD E. WILSON, of counsel,) for the People.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

Plaintiff in error was convicted in the criminal court of Cook county upon the third count of an indictment charging him with manslaughter. The jury in their verdict recommended the minimum penalty. Motions for a new trial and in arrest of judgment were overruled and plaintiff in error was sentenced on the verdict. He has sued out this writ of error to reverse the judgment.

The indictment charged plaintiff in error with having killed Helen O'Connell on December 2, 1917, in the county of Cook and State of Illinois. The first count charged manslaughter in the ordinary form, with an automobile as the instrument. The second count charged the killing by the operation of the automobile at a dangerous and exces-

sive rate of speed. Those counts are eliminated by the finding of the defendant guilty by the jury under the third count. That count charged, in substance, that plaintiff in error was driving an automobile on Twelfth street, in the city of Chicago, at a place where he knew it was the habit and custom of large numbers of persons to be upon the street, and at a place where it was his duty to drive said automobile with care and caution and to observe and ascertain whether persons on foot were then and there on or crossing the street in front of his automobile; that plaintiff in error, in violation of his duty, unlawfully, willfully, negligently and feloniously and with culpable negligence drove the automobile without watching and observing to ascertain whether persons on foot were then and there crossing the street in front of the automobile, and by reason thereof did then and there unlawfully, willfully, feloniously and with culpable negligence drive the automobile upon Helen O'Connell as she was upon or crossing the street on foot, knocking her to the pavement, and then and there drove the automobile over her body, inflicting on her wounds and bruises from which she died.

Plaintiff in error was twenty-nine years old at the time of the killing and was running a garage at 1524 Taylor street, Chicago. He was the owner of the closed limousine driven by him on said day, in which he was conveying passengers between 2:00 and 2:30 o'clock P. M. eastward on Twelfth street. He stopped his car at the west line of Ashland boulevard where it crosses Twelfth street. On the west side of Ashland boulevard Twelfth street is very much wider than it is on the east side of Ashland boulevard. The street car tracks on Twelfth street west of Ashland boulevard are near the north and south curbs, and vehicle traffic there runs between the east-bound street car track on the south side and the west-bound track on the north side. As the car tracks approach the center of Ashland boulevard they both curve abruptly toward the center of the cross-

ing, so that when they have reached the east line of Ashland boulevard they are in the center of Twelfth street, and vehicle traffic there is confined to the space on the north and south sides of the street between the double tracks and the curb lines, the east-bound vehicle traffic being confined to the south side of the street and the west-bound vehicle traffic to the north side. A double street car line occupies the center of Ashland boulevard, and the south-bound vehicle traffic uses the west side of the boulevard and the north-bound traffic the east side. After stopping his automobile on the west side of Ashland boulevard plaintiff in error started to drive across the street car track to the east side of the boulevard and the south side of Twelfth street. A street car came from the west from behind him and was curving in front of him to the center of the crossing. The account given of the killing from this point by plaintiff in error is, in substance, the following: He started his machine at a speed between six and eight miles an hour to cross the east-bound Twelfth street track to the east side of Ashland boulevard. When he reached the track the street car going east on Twelfth street cut him off by running in front of him. He couldn't go further east. If he stopped, the street car would cut him on the side of his machine. If he went further forward it would jam him and he would spill some people. If he stopped, his automobile "would slide over" and the street car would knock his machine over sidewise. If he went forward the street car would run into him. So he turned north toward the north side of the street to go on Ashland boulevard. When he came to Ashland boulevard he saw a couple of machines coming toward him from the north. To save himself he speeded up his car up the north side of Twelfth street after crossing Ashland boulevard, with a view to pass the street car and cross in front of it on Twelfth street and regain the south side of the Twelfth street car tracks, where he belonged as a traveler on that street. When he cut in front

of the street car, going southeasterly, there was screaming and he saw something happen and got sick and fell down. He didn't know what happened at that time and came to a stop against the south curb of Twelfth street. He claims that his speed was twelve or fourteen miles an hour as he was passing in front of the street car, but states that his front axle was bent by striking the curb, which is a point from fifty to sixty feet away from the point where he crossed in front of the street car. Witnesses for the State testified that his speed was from fifteen to twenty-five miles an hour.

It does not definitely appear whether the deceased was, at the moment she was struck by the machine, moving from the south side of Twelfth street in front of the street car to the north side of Twelfth street with a view of taking a street car west-bound on Twelfth street, or whether she had already gotten to the point where west-bound cars are taken. It does definitely appear, from the physical facts, that she was struck by the automobile on the north side of the Twelfth street car track, because the automobile was headed southeast when it struck the woman and her small son, who was with her. The boy was driven onto the east-bound track in front of the street car, which stopped within a foot of the boy while he was lying on the track. The woman's body was driven close to the east-bound car on its blind or north side, and her body was lying on that side of the car, just east of the front wheels. There was a stipulation in the record or an admission by the plaintiff in error that the woman had left her home and was going to visit her neighbor, "and that she was about to take a west-bound car, as soon as one arrived, to go to her destination." This would indicate that she was at the place where such a car could be taken, from thirty to fifty feet east of the east line of Ashland boulevard and on the north side of the east-bound track. The conductor of the street car testified positively that people had been pass-

ing in front of him, going north, just before the woman was hit, but that he did not see the woman and the boy until the boy was thrown on the track in front of his car.

We do not desire to discuss the merits of the case further than to say that plaintiff in error's own testimony can not be clear or satisfactory because of the fact that he testified to conclusions rather than to the actual facts, and his positions at various times cannot be located from his testimony in the record because he testified to them by pointing to a chart which is not in evidence. He testified to no facts showing why he could not have stopped on the north side of Twelfth street,—at least after he passed Ashland boulevard,—and let the street car pass on and cross in the rear of it instead of in front of it. Had the witnesses been confined to the actual facts, instead of testifying to conclusions as to what he could or could not have done with safety, the merits of the case would readily appear in evidence. On another trial this should be done.

Plaintiff in error makes the claim that the indictment is insufficient (1) because it contains allegations of willful and culpable negligence; and (2) because it fails to set out facts charging the crime of manslaughter. Manslaughter is defined by our statute to be the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever. The intent to kill, or malice, is not a necessary ingredient at all in manslaughter. While it is not necessary to charge malice or intent, yet it is well known that a party charged with murder may be convicted of manslaughter under such a charge, for the sensible reason that the charge of manslaughter is necessarily included in the charge of murder. It is common in Illinois for indictments for manslaughter to charge that the defendant unlawfully, feloniously and willfully did the thing or the act that caused the death of the deceased. Under the law in this State the objection to this indictment cannot be sustained, and the court did

not err in overruling the motion in arrest of judgment. The second objection to the indictment is altogether untenable.

Involuntary manslaughter, as defined in our statute, consists in the killing of a human being without any intent to do so, in the commission of an unlawful act, or a lawful act which probably might produce such a consequence in an unlawful manner. It is difficult to see how the offense could be more clearly defined, and the distinction between murder and manslaughter is as clearly made by our statute as it can be in words. Involuntary manslaughter is charged in this case, and the negligent act charged is the driving of the automobile against the deceased by reason of plaintiff in error's culpable negligence in failing to keep a proper lookout for people at that point, where he knew they were customarily to be found congregated. In fact, plaintiff in error stated that he knew that people took the west-bound car on Twelfth street at about the point where he struck the deceased, and at the time that he struck her he was partly on the west-bound street car track and partly on the street with his automobile. The real question in the case is whether he was guilty of culpable or criminal negligence. That was a question of fact for the jury, and they should have been directed to pass upon that fact under instructions free from error or misleading statements as to the law. The fourth instruction for the People given by the court directs the jury, in substance, that every person who drives upon the public highway is under a legal duty to observe, in the control and management of his vehicle, the exercise of reasonable care to prevent injury to others. This is the law, but the instruction goes farther and states that every person is criminally responsible for the neglect or willful failure to perform that duty. It is not the law that a person is criminally responsible for every act of mere negligence that causes the death of another. Negligence, to be criminal, must be gross or wanton negligence. Gross negligence is neg-

ligence that borders onto recklessness, and wanton negligence, as applied to the running of motors and vehicles, implies a positive disregard of the rules of diligence and a reckless heedlessness of consequences, according to Babbitt in his work on motor vehicles, section 1517. Ordinary negligence merely denotes a negative quality in a person in attending or discharging a duty. Criminal liability cannot be predicated upon every lawful act carelessly performed, merely because such carelessness results in the death of someone. Negligence, to become criminal, must necessarily be reckless or wanton and of such a character as shows an utter disregard of the safety of others under circumstances likely to cause injury. *People v. Falkovitch*, 280 Ill. 321.

The State's attorney also made prejudicial remarks to the jury, wherein he stated, in substance, that they should consider what they had read in the newspapers concerning the recklessness of chauffeurs in general, and also consider what had been their own observations of chauffeurs who drive machines for hire, as to whether or not they were negligent or careful. The jury were not warranted in considering what newspapers may have said or their own observations of chauffeurs in general in deciding the guilt or innocence of the plaintiff in error. There is no principle in the law more strictly adhered to in this class of cases than that a defendant should be tried on his own conduct as determined by the evidence itself.

The complaint that the court refused to give certain instructions for plaintiff in error cannot be considered as a matter affecting the validity of the court's judgment, as the abstract does not show that the instructions given for the People and for plaintiff in error are all the instructions that were given on the trial. And for the same reason the question could not arise in this case as to whether or not there is sufficient evidence in the record to support the judgment, as the record does not recite that the evi-

dence therein found is all the evidence that was heard on the trial, as disclosed by the abstract. We may say in conclusion, however, without special comment, that defendant's refused instructions numbered 10, 7, 6, 5, 4 and 3 were properly refused by the court. Some of them were mere abstract propositions of law that gave the jury no aid in deciding the case, while others were very improper because they invaded the province of the jury. Instruction No. 11, marked refused, might properly have been given.

For the errors above noted the judgment of the criminal court is reversed and the cause is remanded.

Reversed and remanded.

(No. 12786.—Decree affirmed.)

ESTHER ESTELLA LINN, Appellant, vs. JAMES CAMPBELL
et al. Appellees.

Opinion filed October 27, 1919.

1. DEEDS—*remainder in fee may be limited after termination of life estate.* As livery of seizin is no longer necessary, where an estate is given to a trustee for the life of the grantor with power in the trustee to sell and convey the fee, a remainder in fee may be limited after the termination of the life estate.

2. SAME—*when deed is not a testamentary disposition.* Where an estate consisting of both real and personal property is given to a trustee for the life of the grantor and a remainder in fee is limited after the termination of the life estate, the fee in the real estate and the absolute title in the personal property vest in the remainder-man on the delivery of the deed, and the instrument does not make a testamentary disposition of property.

3. SAME—*when remainder is vested although subject to be reduced by exercise of power.* Where an estate is given to a trustee with power to sell and convey the fee or so much as is necessary to maintain the grantor during his life a remainder in fee limited to take effect after the death of the grantor is vested, and the uncertainty as to the amount of the estate which may be undisposed of by the trustee at the grantor's death does not render the remainder contingent.

4. TRUSTS—*trustee takes no larger estate than the nature of the trust requires.* Where an estate is granted to a trustee with power to dispose of whatever is necessary to maintain the grantor during his life, the trustee takes no larger estate than the nature of the trust requires.

APPEAL from the Circuit Court of Kane county; the Hon. DUANE J. CARNES, Judge, presiding.

PEFFERS & WING, for appellant.

ALDRICH & WORCESTER, for appellees.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

This is an appeal from a decree of the circuit court of Kane county dismissing on demurrer, for want of equity, a bill filed by appellant, Esther Estella Linn, seeking to have declared void the last paragraph of a certain deed, the material parts of which are as follows:

"This indenture, made this 16th day of October, A. D. 1916, by William T. Linn, an unmarried man, of the city of Aurora, county of Kane and State of Illinois, witnesseth:

"That whereas the said William T. Linn is the owner of certain real estate and personal property described as follows: [Describing a residence lot in Aurora and seven promissory notes aggregating \$7000, and his household furniture;] and whereas said William T. Linn is indebted to sundry parties in sums aggregating about two thousand (\$2000) dollars; and whereas said note No. 1, for \$2000, is held by the First National Bank of Aurora to secure a note and indebtedness dated October 2, 1916, for \$1370.83; and whereas said note No. 5, for \$1000, is held as collateral by the Aurora National Bank of Aurora, Illinois, to secure a note dated June 28, 1916, for \$700; and whereas the said William T. Linn wishes by this conveyance to provide for his care, keep and maintenance during the rest of his natural life and to make a settlement of his estate in such manner that the aforesaid debts may be paid and the remainder may be distributed in accordance with the provisions of the trusts hereinafter created:

"Now, therefore, in consideration of the premises the said William T. Linn hereby conveys and warrants unto James Campbell, of Oswego, Illinois, as trustee, all and singular the property here-

inbefore described, real and personal, upon the following trusts, to-wit:

"1. To pay all debts and obligations owing by and against said William T. Linn or his estate, and to this end the said trustee is authorized and empowered to sell and convey in his name all and singular the property, real and personal, hereinbefore described, and to make and execute in his name, as trustee aforesaid, all instruments or conveyances necessary for that purpose, to collect the interest, rent or proceeds of all said property, and to re-invest the same in such manner as to him seems best.

"2. To hold the residue of said property after the payment of the debts, and to pay the net income thereof to said William T. Linn in person, during his lifetime. No order or assignment shall be accepted and the power to alienate is prohibited. Said trustee shall deduct from any funds coming into his hands reasonable charges for his services in the premises in addition to the taxes, assessments and other legal expenses of administering said trust.

"3. And in case the income of said trust fund shall not be sufficient for the care, maintenance and support of said William T. Linn, the trustee may use so much of the principal as may be necessary for said purpose.

"At the death of said William T. Linn the said trust shall terminate, and the property remaining in the said trustee's hands, real and personal, is hereby granted to Harry Linn, the son of said William T. Linn, and his heirs forever.

"In witness whereof the said William T. Linn has hereunto set his hand and seal the day and year first above written.

WILLIAM T. LINN. (Seal)"

The bill alleges, in substance, that William T. Linn married appellant in 1906; that she lived with him for about ten years and in 1916 obtained a divorce for his fault; that he did not re-marry; that shortly after she obtained her divorce he made, executed and delivered the foregoing deed; that the grantee, James Campbell, accepted the trust established by said deed and thereafter acted as such trustee under said deed until the death of Linn; that at the time he made and delivered said deed Linn was the owner of the real and personal property mentioned in the deed; that Linn at said time owed substantially no indebtedness except to the two banks mentioned in the said deed for the amounts and secured by the collateral security as recited and set forth in said deed; that the real estate mentioned in

said deed was a residence property of the value of \$4000; that the promissory notes mentioned and described in said deed were worth the face value thereof; that the household and chattel property mentioned in said deed was worth \$500; that prior to the death of Linn, Campbell paid the indebtedness due the banks and the banks surrendered the notes held as collateral security to Campbell and that Campbell now holds the same; that September 20, 1917, Harry Linn, mentioned in said deed, died intestate, leaving as his only heir-at-law his niece, Irene Linn, a minor of the age of twelve years, residing in Michigan City, Indiana; that Harry Linn left no widow him surviving; that after the death of his son, Harry Linn, and because of his death, William T. Linn made his last will and testament September 29, 1917, by which he bequeathed to his grand-daughter, Irene Linn, the sum of \$100, and devised and bequeathed to appellant all the rest, residue and remainder of his estate; that William T. Linn departed this life December 24, 1917, leaving his last will and testament, which was duly admitted to probate in the probate court of Kane county February 26, 1918; that the trustee used very little, or substantially none, of said property to provide for the care and maintenance of William T. Linn during his lifetime and none to pay debts of said Linn, except the notes owing said banks; that the real property and substantially all of the personal property are now held by said trustee in his possession, custody and control under said trust deed; that Campbell claims all of said property belongs to Irene Linn as heir-at-law of Harry Linn, deceased, and threatens to deliver the same to Irene Linn, to the damage and injury of appellant as legatee and devisee under the last will and testament of William T. Linn; that the only debts owing by William T. Linn are expenses of his last sickness and his funeral, which do not exceed the sum of \$500; that Campbell claims compensation for his services as trustee and an allowance for attorney's fees and other expenses and

expenditures in administering said trust, which appellant denies; that the trust established by said deed has terminated and that the provision contained in the deed that "the property remaining in said trustee's hands, real and personal, is hereby granted to Harry Linn, the son of said William T. Linn, and his heirs forever," is invalid and is null and void; that as legatee and devisee under the last will and testament of William T. Linn appellant is entitled to the fee simple title and the full and exclusive possession of all the real estate mentioned in said deed, and that the trustee should be directed and required to convey the same to appellant, and that the trustee should be required and directed to turn over all the personal property remaining in his hands at the time of the death of William T. Linn to Joseph H. Freeman, as executor of the last will and testament of said Linn, to the end that the same, after proper administration of the estate under said last will, may be transferred to appellant, as residuary legatee under said will.

James Campbell, individually and as trustee, Joseph H. Freeman, as executor of the last will and testament of William T. Linn, deceased, and Irene Linn, are made parties defendant. N. J. Aldrich was appointed guardian *ad litem* for the minor defendant, Irene Linn. General demurrers filed by James Campbell, individually and as trustee, and by Irene Linn, were sustained.

Appellant contends that the deed is testamentary in character and that the limitation over to Harry Linn is void for that reason; that the deed attempts to convey property by way of remainder, which may or may not be left on the death of the grantor, and is therefore void for uncertainty; that the deed creates a fee in the trustee and that no remainder can be limited after a fee.

This case presents a conveyance by deed to a person *in esse*, expressed to take effect at the grantor's death but not in terms reserving to the grantor a life estate. Since livery of seizin is no longer necessary in this State, such

a conveyance created in the remainder-man a valid future interest. The fee in the real estate and the absolute title in the personal property vested in the remainder-man on the delivery of the deed, and therefore the instrument in question does not make a testamentary disposition of property. *Shackelton v. Sebree*, 86 Ill. 616; *Harshbarger v. Carroll*, 163 id. 636; *Latimer v. Latimer*, 174 id. 418.

A trustee will take no larger estate than the nature of the trust requires. It seems clear that the grantor intended his son should have whatever property remained after the grantor's death. The estate granted to the trustee was a life estate *pur autre vie*, with power in the trustee to dispose of whatever part of the principal was necessary to maintain the grantor during his lifetime. The law is well settled that an estate may be given to a person for life with power to sell and convey the fee, and that a remainder may in such case be limited in fee after the termination of the life estate. A remainder so limited is vested, though subject to be defeated by the exercise of the power by the life tenant. The uncertainty as to the amount of the reduction because of the disposition of the estate, or a part of it, for the comfort or necessities of the life tenant, and the consequent uncertainty as to the amount of the estate which may be undisposed of, do not render the remainder contingent. (*Burke v. Burke*, 259 Ill. 262; *Forbes v. Forbes*, 261 id. 424; *Bradley v. Jenkins*, 276 id. 161; *Ward v. Caverly*, 276 id. 416.) The estate specified in the deed was therefore an estate in fee simple, limited to take effect after a life estate *pur autre vie*, vested by necessary implication in the trustee for the life of the grantor. The grantor having divested himself of all control of the property in question had nothing left to convey by will.

The decree of the circuit court is affirmed.

Decree affirmed.

(No. 12317.—Reversed and remanded.)

THE MISSISSIPPI RIVER POWER COMPANY, Defendant in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.*—(CORA L. HAYWARD, Plaintiff in Error.)

Opinion filed October 27, 1919.

1. WORKMEN'S COMPENSATION—*when employee's failure to observe directions for safety will not relieve employer of liability.* Where an employee of a power company is electrocuted by coming too near a live wire while on a tower for the purpose of doing his work, his contributory negligence in carelessly failing to observe a positive direction not to go near the live wire will not relieve the employer from liability to make compensation.

2. SAME—*filing of a claim with commission is sufficient if employer has notice.* Under section 24 of the Workmen's Compensation act, requiring claim for compensation to be made within six months after the accident, it is not essential that a claim shall have been made previous to presenting the claim to the Industrial Commission, provided the latter claim shall have been presented and the employer notified within the six months.

3. SAME—*section 7f of Compensation act, as amended in 1915, applies only where employer pays compensation voluntarily.* Section 7f of the Workmen's Compensation act, as amended in 1915, giving the employer the option of paying compensation either to the deceased employee's personal representative or to his beneficiaries, applies only to cases where the employer pays compensation voluntarily, without a hearing and determination before an arbitrator or the Industrial Commission. (*Smith-Lohr Coal Co. v. Industrial Com.* 286 Ill. 34, followed.)

4. SAME—*section 19 of Compensation act does not require claim for death to be presented by administrator.* While the term "personal representative" ordinarily means an executor or an administrator, the use of the term in section 19 of the Compensation act does not require that in case of the death of an employee the petition shall be filed by the administrator or executor but it may be filed by the beneficiary.

5. SAME—*the Compensation act takes away action for wrongful death of employee.* Where the Workmen's Compensation act applies it takes away all causes of action for the death of an employee and provides compensation according to an established scale.

6. INJURIES—*proceedings for wrongful death are statutory—parties.* A cause of action for an injury resulting in death was

unknown to the common law and is purely statutory, but an amendment of the statute substituting one party for another as the proper person to bring the action merely affects the procedure and does not affect the substantial rights of the parties.

THOMPSON, J., dissenting.

WRIT OF ERROR to the Circuit Court of Hancock county; the Hon. HARRY M. WAGGONER, Judge, presiding.

SCOFIELD, HARTZELL & CALIFF, HOFFMAN & HOFFMAN, and HOLLINGSWORTH & BLOOD, for plaintiff in error.

O'HARRAS, WOOD & WALKER, for defendant in error.

Mr. CHIEF JUSTICE DUNN delivered the opinion of the court:

Orin Hayward, a lineman in the employ of the Mississippi River Power Company, was killed on April 16, 1916, by an electric shock received from the company's line. On the application of his mother, Cora L. Hayward, to the Industrial Commission, an award was made to her, which the circuit court of Hancock county on a writ of *certiorari* set aside and she has sued out a writ of error to review the judgment.

The deceased was a young unmarried man and was survived by his father, mother and two sisters. It is claimed that he contributed to his mother's support and that his death occurred in the course of his employment and arose out of it. The defendant in error denies both these claims and insists that no claim for compensation was made within six months, that the proceeding cannot be maintained by the plaintiff in error in her own name, and that section 2 of the Workmen's Compensation act is unconstitutional. The constitutional question is decided adversely to the defendant in error in *Victor Chemical Works v. Industrial Board*, 274 Ill. 11.

There was testimony that the deceased had contributed various sums of money to his mother's support during the

four years prior to his death. The fact that she had made a will in his favor is not material. There is no evidence that the will was the result of an agreement to give him all her property or of any agreement.

The company has a transmission line, on which a current of 110,000 volts is conducted, from Keokuk, Iowa, to St. Louis. The line is carried on steel towers from 50 to 55 feet high. The accident happened at a sub-station, where the wires are brought down to a lower tower known as a switch rack. The ground in the immediate vicinity was fenced to keep people out. On the top of the rack were three switches to disconnect different lines. The rack was about 12 by 30 feet. Six men went up on the rack and were at work 20 or 30 feet above the ground. On one side of the rack the wires and cables had been cut out so that there was no current, but on the other side of the rack was a live wire carrying electricity, which was 14 feet from the dead line. A man could work safely within four to six feet of the live wire but not closer. Hayward was not an expert lineman but was working as a helper to one Eckstrom, bringing up tools, handing them to Eckstrom and taking the tools Eckstrom was not using. Charles Cote was the only person who saw the actual occurrence. He stated that the general purpose on the tower was repairing it; that it was not working well and they gave it a general overhauling; that when the electricity struck Hayward it jumped about 15 feet and came over to where he was; that Hayward was at work next to the live line, but he could not tell how close; that Hayward was not at the place where he had been working but had moved about 10 feet, and Cote did not know what he was doing there.

The defendant in error relies upon the case of *Dietzen Co. v. Industrial Board*, 279 Ill. 11. Hayward had been directed not to go over to the live side, and the defendant in error regards this prohibition as of the character referred to in that case, quoting from Elliott on Workmen's

Compensation Acts, as limiting the sphere of employment and not merely dealing with conduct within that sphere. Hayward was employed in repairing the tower, and the prohibition against going near the live wire referred to his conduct in doing that work. There is no evidence that he had undertaken to do anything outside of his employment. While no one testified to the particular act he was doing at the time he was struck, if he was doing anything, it is evident that he was on the tower for the purpose of doing his work in the course of his employment, and his contributory negligence in carelessly failing to observe the direction not to go near the live wire does not relieve his employer from liability to make compensation. The theory of the defendant in error is that Hayward deliberately disobeyed orders and walked across the rack into the field of the live wires. The conclusion may fairly be drawn from the evidence that through his inexperience or carelessness he moved too close to the live wires, and in such case the determination of the commission concludes the court.

Section 24 of the Workmen's Compensation act provides that no proceedings for compensation shall be maintained unless claim for compensation has been made within six months of the accident. The claim was filed with the Industrial Commission and notice was served upon the defendant in error within that time. It is not essential that a claim shall have been made previous to presenting the claim to the commission, provided that the latter claim shall have been presented and the employer notified within the six months.

Section 18 of the Workmen's Compensation act provides that "all questions arising under this act, if not settled by agreement of the parties interested therein, shall, except as otherwise provided, be determined by the Industrial Board." Section 19 provides that "any disputed questions of law or fact upon which the employer and employee or personal representative cannot agree, shall be determined

as herein provided. (a) It shall be the duty of the Industrial Board, upon notification that the parties have failed to reach an agreement, to designate an arbitrator." The manner in which the notification shall be given and the person by whom it shall be given are not expressly stated in the act, but section 16 provides that "the board may make rules and orders for carrying out the duties imposed upon it by law, which rules and orders shall be deemed *prima facie* reasonable and valid; and the process and procedure before the board shall be as simple and summary as reasonably may be." Section 19 provides that the petitioner may elect to have the dispute determined by a committee of arbitration by filing with the board his election in writing with his petition, and the other party by filing his election in writing within five days of notice to him of the filing of the petition. It also provides that the applications for adjustment of claim, and other documents in the nature of pleadings filed by either party, together with the decisions of the arbitrator and of the Industrial Board, and the statement of facts or stenographic reports provided for, shall be the record of the proceedings of said board. Section 7g (which was section 7f in the amendment of 1915) provides that compensation to be paid for an injury which results in death shall be paid, at the option of the employer, either to the personal representative of the deceased employee or to his beneficiaries, and that a payment to the personal representative shall relieve the employer of all obligation as to the distribution of such compensation, and the personal representative shall make distribution pursuant to the order of the court appointing him. In *Smith-Lohr Coal Co. v. Industrial Com.* 286 Ill. 34, we held that this provision of the statute applied only to cases where the employer paid the compensation voluntarily, without a hearing and determination before an arbitrator or the Industrial Commission. The personal representative mentioned in this provision is clearly the administrator of the deceased employee

or the executor of his will. The defendant in error insists that the same meaning must be given to the term "personal representative" in section 19, and that only the administrator of the deceased employee or the executor of his will can present a claim for compensation to the Industrial Commission.

The term "personal representative" ordinarily means the executor or administrator, but its use in section 19 does not determine who is entitled to file the petition with the Industrial Commission. The Workmen's Compensation act by section 6 takes away all right to recover damages for the death of an employee who is covered by the provisions of the act, and section 11 declares that the compensation provided by the act shall be the measure of the responsibility of the employer who is within its terms. The compensation for an injury resulting in death is fixed by section 7. At the time of this accident, if the employee left a widow, child or children whom he was under legal obligation to support, the compensation was a sum equal to four times the average annual earnings of the employee, not less than \$1650 and not more than \$3500. If there was no widow or child whom the employee was under a legal obligation to support at the time of his injury, but he left any parent, grandparent or other lineal heir to whose support he had contributed within four years previous to the time of his injury, the compensation was a sum equal to four times the average annual earnings of the employee, but not less than \$1650 and not more than \$3500. If no amount was payable to the relatives mentioned and the employee left collateral heirs, such a percentage of the above amounts was payable as the deceased's average annual contribution to the support of such collateral dependent heirs during two years preceding the injury bore to his average annual earnings during such two years.

A cause of action for the death of a human being was unknown to the common law. Statutes creating the cause

of action have been passed, sometimes providing for a recovery by an administrator, sometimes by the person entitled to receive the damages. It is purely a matter of statutory regulation. In this State, under the Injuries act, (sometimes called the Lord Campbell act) the action must be brought by the administrator, while under the former Mining act it was required to be brought by the widow or other dependent of the deceased. (*City of Chicago v. Major*, 18 Ill. 349; *Litchfield Coal Co. v. Taylor*, 81 id. 590.) An amendment of the statute substituting one party for another as the proper person to bring the action is a mere matter of procedure not affecting the substantial rights of the parties. (*Merlo v. Coal and Mining Co.* 258 Ill. 328.) The Workmen's Compensation act takes away all causes of action for the death of an employee and provides compensation according to an established scale. It declares to whom the compensation shall be paid, and authorizes the employer of a workman who has sustained accidental injuries resulting in his death to pay the compensation either to the employee's administrator or to the beneficiary entitled to it. If he does not do this, any disputed questions, "if not settled by agreement of the parties interested therein," must be determined by the Industrial Commission in the manner provided by the act. The proceeding to determine these questions is not judicial though it has some of the elements of a judicial proceeding. The Industrial Commission is not a court but a ministerial body having jurisdiction over the operation and administration of the act, with power to make rules and orders for carrying out the duties imposed upon it by law, and the statute provides that the process and procedure before it shall be as simple and summary as reasonably may be. The amount of compensation to be paid is fixed according to the schedule in the statute; the person to whom it is due is fixed. The estate of the deceased has no interest, for under no circumstances can any part of the compensation be paid for its benefit.

The only reason an administrator ever could maintain a suit for the death of his intestate was because the statute giving the right of action for the benefit of the widow and next of kin directed that suit should be brought in the name of the personal representative. The Workmen's Compensation act gives a right to compensation to certain persons—in this case the mother. It provides for the adjustment of the right by an administrative body. The proceeding is not a lawsuit, and the statute does not expressly or by necessary implication require that it shall be begun by an administrator. The compensation is due to the mother, and neither the estate nor any other person is interested in it. The natural person to file the petition is the person to whom payment should be made, who alone is interested. It does not appear whether or not the commission has adopted any rules of procedure, but certainly the simplest and most summary way was to act, as the commission did, on the petition of the beneficiary, who alone was interested in the claim. Of course, if the statute required the proceeding to be in the name of the administrator, he alone could begin it. But the statute does not require it. An employer may pay compensation either to the administrator of the deceased employee or his beneficiary. If this is not done and any dispute arises, the administrator, the beneficiary or the employer may file a petition with the Industrial Commission for the adjustment of the claim and the commission may then proceed to determine the matter. If any question arises as to who is entitled to the compensation, the commission may require all claimants or possible claimants to be notified and may determine who is entitled to it, as was done in the case of *Smith-Lohr Coal Co. v. Industrial Com. supra*. In this case the only possible claimants were before the commission; the father made no claim; the evidence showed he was not entitled to compensation; he had assigned his rights to the plaintiff in error, and the six months' time for giving notice of claim had expired.

The judgment of the circuit court is reversed and the cause is remanded, with directions to quash the writ of *certiorari*.

Reversed and remanded, with directions.

Mr. JUSTICE THOMPSON, dissenting:

I regret that I cannot agree with the reasoning or the conclusions reached in the majority opinion filed in this cause.

The Compensation act clearly contemplates that no proceeding shall be brought before the Industrial Commission except where the parties fail to reach an agreement. In other words, the purpose of the act is to provide a standard by which the employer and employee can agree on the compensation due. This affords speedy and inexpensive justice for the injured employee, or, in case of the employee's death, for his beneficiaries. The act specifically provides that no proceeding for compensation under the act shall be maintained unless a claim for compensation has been made within the time specified. Clearly, the purpose of this claim is to afford a basis for discussion so the parties will have an opportunity to agree. If the employee or his representative does not file a claim with the employer, the employer has no opportunity to adjust the loss if so disposed and both parties lose the advantages of the act. In the instant case no claim whatever was filed with the employer, but, without making any effort to get a settlement, the applicant filed a claim with the Industrial Board more than five months after the accident, and the first notice the employer had of a claim growing out of this accident was when it received notice of the filing of the claim from the Industrial Commission, nearly six months after the accident. In other words, the very purpose of the act was defeated by the failure to file a claim for compensation with the employer.

The main contention in this case is whether the proceeding must be instituted by an administrator or other personal

representative, or whether it can be carried on in the name of one of the beneficiaries. Section 19 of the Compensation act of 1915 (the one under which this proceeding is brought) provides: "Any disputed questions of law or fact upon which the employer and employee or personal representative cannot agree shall be determined as herein provided." The purpose of this section is to determine by whom and in whose name action shall be brought in case the parties cannot agree. If alive, the employee brings the action; if he be dead, then his personal representative. "The term 'personal representative' has been uniformly held to mean the executor or administrator of the deceased and not to include the next of kin." (5 Ency. of Pl. & Pr. 853.) In construing the Injuries act (Hurd's Stat. chap. 70,) we held that the words "personal representative" meant the executor or administrator. *City of Chicago v. Major*, 18 Ill. 349.

It is contended by plaintiff in error that the term "personal representative" may mean next of kin. When the sense will bear it, the usual and popular meaning must be given to words found in a statute. (*Culver v. Waters*, 248 Ill. 163.) Had the statute failed to provide by whom the action should be brought, it must, under the general rule, have been brought by and in the name of the personal representative,—the administrator or executor. The only exception is where it affirmatively appears from the pleadings that there have been no letters of administration granted and that the estate owes no debts. (*Moore v. Brandenburg*, 248 Ill. 232.) In this case no such situation appears from the pleadings. Here the statute vests in the personal representative the right of action, and that person, alone, has control of the proceedings. *Washington v. Louisville and Nashville Railway Co.* 136 Ill. 49.

There is another section of this act which has for its purpose the fixing of the amount of compensation and to whom it shall be paid. Paragraph (f) of section 7 of the

act of 1915 provides that "the compensation to be paid for injury which results in death, as provided in this section, shall be paid at the option of the employer either to the personal representative of the deceased employee or to his beneficiaries." Here is affirmative language in this act showing that a "personal representative" is a person distinct from a "beneficiary." Where a word is used in several clauses of a statute, the same meaning will be given it in each part unless there is something in the context of the statute indicating that the legislature intended to give it a different meaning. (*People v. Busse*, 240 Ill. 338.) So if the term "personal representative" here means administrator or executor it must necessarily be given the same meaning in section 19, because there is nothing to indicate that the legislature intended a different meaning. Under said section 7 a settlement is contemplated without the intervention of the Industrial Commission. If a settlement is made and the money paid to the beneficiaries named in the act the employer is protected from another claim, but if a settlement is not made, then by section 19 of the act a personal representative must maintain the proceedings. Since the right of action is purely statutory, the law is well settled that the action can only be brought by and in the name of the person to whom the right to sue is given by statute. There is no provision in the act which either expressly or impliedly authorizes the bringing of this action by a beneficiary when the employee is dead.

I do not pass on the wisdom of the provision in the act of 1915 requiring the proceeding to be maintained in the name of the personal representative. That is a question which rests with the legislature, and by reference to the Compensation act, as amended by an act approved June 28, 1919, it would appear it has decided the provision was not a wise one. By this amendment it will be seen that the term "personal representative" is omitted from section 19, and if the present act were the one under which

this proceeding had been brought I would concur in the conclusion on this point reached in the majority opinion.

Furthermore, there is, in my opinion, no proof in this record showing that the deceased contributed to the support of plaintiff in error. According to her own testimony she owned forty acres of land in Michigan, on which she resided, and she was paying for another forty, on which there remained a debt of \$200. Her husband, an able-bodied man fifty-six years old, lived with her on the farm but worked in the timber. He had personal property valued at \$1700, and from his earnings he kept the house and paid the grocery bills. It appears that there was some trouble between the father and son and that the son could not or would not live at home. It further appears from the testimony of plaintiff in error that she had made an arrangement with her son by which he was to furnish her money when she needed it, and in return she had made a will by which he was to receive, on her death, all her property. According to her testimony, during the four years prior to his death her son had furnished her different sums of money, amounting in all to slightly over \$300. Seventy-five dollars of this was given her to apply on the purchase price of the forty acres she was buying and \$170 was given her to pay for farm work, such as caring for and harvesting the crops. On three occasions he gave her money which she used in paying railroad fare on trips to railroad points in Michigan and elsewhere. On three or four occasions he sent her small sums of money which she used to buy some articles of clothing for herself and her adult daughters. All of these sums were sent to the mother at irregular intervals. Under the circumstances shown by this record the son was under no legal obligation to support his mother. There is no presumption that sums of money given a parent by a child, where the child is under no legal obligation to support the parent, are contributions to this parent's support. (*Bromwell v. Bromwell*, 139 Ill. 424.) The pre-

sumption is rather that the sums were owing to the parent or that they were given the parent as presents. Because a son who is earning more than \$100 a month sends \$10 or \$15 a year to his mother is no proof whatever that he is contributing to his mother's support. Clearly, the money sent by the son to apply on the property which he was assured he would receive by will is not a contribution to the mother's support. The burden is on the applicant to prove every element essential to sustain the award. (*Ohio Building Vault Co. v. Industrial Board*, 277 Ill. 96; *Savoy Hotel Co. v. Industrial Board*, 279 id. 329; *Wisconsin Steel Co. v. Industrial Com.* 288 id. 206.) From a careful study of this record I am convinced that the plaintiff in error has wholly failed to prove that deceased made any contributions toward her support.

It is my view that the circuit court was right when it quashed the award of the Industrial Commission, and its judgment should be affirmed.

(No. 12774.—Decree affirmed.)

FLORENCE M. MCCARTHY, Appellant, vs. HANNAH
MCCARTHY, Appellee.

Opinion filed October 27, 1919.

1. TRUSTS—*resulting trust arises by operation of law.* A resulting trust does not spring from a contract between the parties but arises by operation of law from the acts of the parties.

2. SAME—*when a resulting trust arises.* A resulting trust arises where one person has the money of another to invest for the owner, uses the money to purchase land and takes title in his own name.

3. SAME—*when evidence is not sufficient to establish resulting trust.* To establish a resulting trust the evidence must be full, clear and satisfactory that the title was taken by the grantee under such circumstances that the trust at once resulted; and where the more reasonable construction of the evidence is that the owner of the money permitted it to be used in the purchase of the property with the understanding that it was to be re-paid him when he wanted it, proof to establish and enforce a resulting trust is not sufficient.

APPEAL from the Circuit Court of Cook county; the Hon. KICKHAM SCANLAN, Judge, presiding.

SAMUEL J. LUMBARD, and THOMAS F. MONAHAN, for appellant.

D'ANCONA & PFLAUM, for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

This is an appeal from a decree of the circuit court of Cook county dismissing for want of equity a bill in chancery filed by appellant against appellee. The bill prayed that appellee be decreed to hold in trust for appellant an interest in certain real estate described in the bill, which interest it was alleged was purchased with the money of appellant, and that appellee be required to account for the rents and profits of the premises.

Appellant and appellee are brother and sister, and they, their mother, two other brothers and a sister resided in Chicago. Neither appellant nor appellee has ever been married and appear to have lived with their mother in Chicago until some time in 1902, when appellant went to St. Louis, where he was employed in a leather-belt manufacturing establishment. His wages began at \$100 per month and were increased from time to time until 1908, when he was receiving \$40 per week. His wages were subsequently increased to \$100 per week. Soon after he began work in St. Louis he began sending money to his sister, the appellee. He testified he had no bank account in St. Louis and that he began in 1902 to have her take care of his savings for him. Sometimes the money was sent by registered mail, sometimes in currency by mail without being registered. Appellant testified he had an agreement with appellee to buy property with the money after they had saved \$1000, which he supposed would take a couple of years. Although it is not admitted by appellee, we think the proof shows

reasonably clearly that, all told, appellant sent her \$4510. Appellee deposited most of the money received from appellant by her in a savings account in the Hibernian Bank, in her own name.

Appellant's contention is,—and that is the theory of his bill,—that he began sending money to the appellee for safe keeping for his account; that in June, 1908, it was agreed between appellant and appellee that she should purchase a piece of real estate and pay for it with the money of appellant and other members of the McCarthy family; that appellant's money was so used and invested by appellee, and in fraud of his rights the deed to the property was caused by the appellee to be made to herself and her mother, Ann McCarthy, as joint tenants. Ann McCarthy died in June, 1913, and appellee claimed, as survivor, to be the sole owner of the property. Appellant alleges in his bill that he fully believed, expected and intended appellee would take the title to the property purchased in his name in such a way as to protect him for the money he had put in the purchase of it, but without his knowledge or consent the title was taken in the name of appellee and her mother as joint tenants. Appellee's contention is that the transaction between her and her brother was simply a debit and credit transaction; that the appellant sent her from time to time money for safe keeping for him, to be drawn on by him as he found use or need for the money, and that she at his request paid and returned to him all the money he deposited with her.

The property in controversy was purchased by appellee in June, 1908, for \$8250. A cash payment of \$6900 was made and the property conveyed subject to a mortgage for the remainder. Appellee testified she used \$3240 of appellant's money in making the cash payment; that she did this with his knowledge and consent and with the understanding between them he could have his money back at any time he called for it. The correspondence between ap-

pellant and appellee shows that appellant knew of the negotiations for and the purchase of the property and permitted appellee to use his money in making the cash payment. The real controversy is whether, as claimed by appellee, the use of appellant's money was a mere temporary accommodation, the amount so used to be returned to him when called for, or whether, as claimed by appellant, he was entitled to an interest in the property and entitled to it in proportion to the amount of money invested in it.

The law is well settled that a resulting trust does not spring from a contract between the parties but arises by operation of law from the acts of the parties. Where one person has the money of another to invest for the owner and uses the money to purchase land and takes title in his own name, the law will hold him to be a trustee for the owner of the money used in buying the land. Appellant testified that he began in 1902 sending his money to appellee to take care of for him; that she informed him she deposited it in the bank in her own name, and from time to time he drew against the fund; that at his request she paid his insurance dues to the Maccabees, which she says was \$1.90 per month. He testified he drew \$500 in 1903 or 1904, and about 1906 he agreed to loan Frank Murphy \$100, and at his request the appellee let Murphy have the money. This, as we understand his testimony, is all he claims to have drawn from the fund deposited with appellee prior to the purchase of the property, in June, 1908. He testified that in 1911 appellee at his request sent him \$2450, and those amounts are all he claims to have drawn out of the fund deposited with appellee. Appellee's testimony is not at all clear as to how much of the fund she returned to appellant. Whether she claims to have returned to him \$3552.40 or \$4002.40 we cannot understand from her testimony. It was one amount or the other. If the first named sum is the correct amount she returned to appellant she still has in the neighborhood of \$1000 of his money;

if it was the last named sum, she still has about \$500 of his money. According to the testimony of appellant the amount paid him by appellee is between \$1500 and \$1600 less than the amount he deposited with her.

January 3, 1911, which was about two and a half years after the property was purchased, appellant wrote appellee to send him all the cash she had, as he wished to use it to pay for stock in the concern he was working for. He wrote: "You have the bank send me a check, as that will be the safest way. Now, Sis, I don't think you ought to take it all out. You may leave a balance, but send me all you can; and tell Dan to save all he can, as we will all benefit by this transaction." On January 6, 1911, appellant wrote appellee that in the next two or three months he might want her to raise \$3500; that the money he had "put with you, Dan and mother is not giving me any interest at all;" that the money could be raised by mortgaging the property, which he referred to as "the new home," which he did not want to mortgage if it could be arranged in some other way, and that he would try to otherwise arrange it. On July 6, 1911, Snyder & Co., bankers in Chicago, sent appellant a check for \$2450 in a letter stating, "at the request of your mother, sister and brother we herewith send you check for \$2450." Appellee appears to have written appellant about the time the check was sent, but her letter was not introduced in evidence. She testified she wrote appellant that the \$2450 was all that was coming to him, and that he did not reply to the letter. Appellant testified he had no recollection what she said about it; that he believed she said something to the effect that the check squared the account with him, but he did not remember. On June 25, 1911, appellant wrote his brother Dan that in reply to his request of appellee for \$3000 he had received an answer which he never expected. He stated he had never worried about putting his money in the new home. "I put it in willingly and never thought there would be a ques-

tion at all if I wanted the amount I asked for, as I want to put it in this business, as I am getting along where I have to see some kind of an income for myself when a few more years creep over my head."

Something near forty letters from appellee to appellant about the receipt of money from him and concerning the purchase of the property were introduced in evidence. They admit the money of appellant was used in paying for the property. They are to some extent incoherent, but we fail to find in any of them any clear statement that the money of appellant was to be used in paying for the property as an investment for him. But few letters written by appellant were put in evidence, but what he did write, considered in connection with the letters of appellee, indicates that the understanding was to use his money in paying for the property but it was to be returned to him when he called for it. In March, 1910, appellee wrote appellant about how much of his money had been used in buying the property, and said: "The money of yours is safe. You don't need to be afraid. You'll get all is coming and more with it. * * * Your money is here, Flor, and you needn't be afraid of your money. It's safe." In January, 1911, which was long after the property was purchased, appellant wrote appellee a letter asking her to send him all she, her mother and Dan had on hand; that she have the bank send it by check, and suggested "you need not take it all out; you may leave a balance, but send me all you can." A few days later he wrote he would in the next two or three months want about \$3500, and suggested, if necessary to do so, the property be mortgaged to secure it. In June, 1911, appellant wrote his brother he willingly put his money in the purchase of the property and never thought there would be any question if he wanted it; that he wanted to invest it in the concern he was working for; that he was only asking for his own and hoped he would not have to ask for it again. Appellee sent him, through Syndacker &

Co., \$2450 in July, 1911. While the evidence does not support the claim of appellee that that sum and the previous amounts appellant had drawn was all he had sent her, the proof seems more consistent with appellee's contention that the money deposited with her by appellant and which was invested in the property was used by his consent with the understanding it was to be re-paid him when he wanted it, than it is with appellant's contention.

The evidence to establish a resulting trust must be full, clear and satisfactory that the title was taken by the grantee under such circumstances that the trust at once resulted. (*Francis v. Roades*, 146 Ill. 635.) This court said in *Goelz v. Goelz*, 157 Ill. 33: "The rule is well settled that where the evidence is doubtful and not entirely clear and satisfactory, or is capable of reasonable explanation upon theories other than that of the existence of an implied or a resulting trust, such trust will not be held to be sufficiently established to entitle the beneficiary to a decree declaring and enforcing the trust." Tested by these rules, which are adopted and applied by the courts of our country generally, it will be seen the evidence falls short of the proof required to establish and enforce a resulting trust. It is true that in some of the letters of appellee to appellant she speaks of the property as "our property" and says appellant's money is in it, but her correspondence, considered as a whole and in connection with the letters of appellant, with the further fact of his drawing on the fund to the extent of about \$3000 according to his own testimony, would not warrant us in reversing the decree on the ground that the denial of the relief prayed in appellant's bill was palpably contrary to the evidence. Whatever remedy appellant may have, we are satisfied that under the evidence he was not entitled to the relief prayed in his bill and that the circuit court did not err in dismissing the bill for want of equity.

The decree is affirmed.

Decree affirmed.

(No. 12755.—Judgment affirmed.)

THE CITY OF CHICAGO, Appellant, vs. L. MAX *et al.*
Appellees.

Opinion filed October 27, 1919.

1. *STATUTES—pre-existing law should be considered in ascertaining intent of legislature.* In construing a statute the principal object is to ascertain and give effect to the intent of the legislature, and to ascertain that intent the entire act, together with the pre-existing law on the subject and any changes in the law made by the act, and the apparent motive for making such changes, should be considered.

2. *SPECIAL ASSESSMENTS—purpose of public hearing in the original proceeding.* The purpose of the public hearing required in the original proceeding for a local improvement is to give property owners a chance to be heard and to determine whether they will consent to or oppose the contemplated improvement or any of the elements thereof or propose modifications with reference to same.

3. *SAME—right to public hearing is a substantial right.* The right to a public hearing is a valid and substantial right, which should not be lightly disregarded.

4. *SAME—amendment of 1905 to section 59 of Local Improvement act allows public hearing before work is done.* The amendment of 1905 to section 59 of the Local Improvement act, providing for a public hearing on supplemental proceedings if the estimated deficiency exceeds ten per cent of the original estimate, allows a public hearing before the work is done, so as to give an opportunity to the property owners to protest as to the character of the improvement and as to its completion as originally intended.

APPEAL from the County Court of Cook county; the
Hon. S. N. HOOVER, Judge, presiding.

SAMUEL A. ETTelson, Corporation Counsel, ALBERT L. GREEN, EUGENE H. DUPEE, HARRY A. TIFFANY, and OTTO W. ULRICH, (GEORGE P. FOSTER, and WILLIAM H. DILLON, of counsel,) for appellant.

WILLIAM T. HAPEMAN, (GEORGE A. MASON, of counsel,) for appellees.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was a proceeding to levy and collect a supplemental assessment to cover a deficiency in the cost of curbing, grading and paving with brick the alley between East Eighty-ninth street, East Ninetieth street, Commercial avenue and Exchange avenue, in the city of Chicago. The engineer's estimate of the cost of the original proceeding was \$4531.50. The county court on the original hearing made certain reductions and confirmed the estimated roll for \$4501.50. When the bids were received for doing the work it was found that they exceeded the estimated cost of the improvement. On January 14, 1918, the city council of Chicago passed an ordinance for a supplemental special assessment to pay the said estimated deficiency. This estimated deficiency was more than ten per cent of the original estimate, but no public hearing was held by the city authorities on the supplemental assessment until November 30, 1917, after the contract had been awarded and the work fully completed. Objection was filed to the supplemental assessment in the county court on the ground that a public hearing had not been held at the proper time, and after a hearing that objection was sustained. This appeal followed.

The only question involved in this case is whether the public hearing provided for in amended section 59 of the Local Improvement act should have been had before the contract was let.

Section 59 as originally enacted in the Local Improvement act of 1897 provided that if the first assessment proved insufficient a second might be made in the same manner as nearly as may be, and so on until sufficient moneys shall have been realized to pay for the improvement. This section was amended in 1901 so as to provide that the petitioner, if it desired, might elect to dismiss the petition and vacate the judgment, either before or after the term at which it was rendered, and begin new proceedings. There was no provision in the act as originally passed

or as amended in 1901 providing for a public hearing on the supplemental assessment, nor was there any provision for levying a supplemental assessment based upon an estimated deficiency. Under section 59 as then worded it was held by this court that a public hearing was not required on the supplemental assessment and that such supplemental assessment could not be levied until after the work was completed. (*City of Chicago v. Noonan*, 210 Ill. 18; *City of Chicago v. Richardson*, 213 id. 96; *Sheriffs v. City of Chicago*, 213 id. 620.) Section 59 was amended in 1905 so as to provide that at any time after bids had been received, if it should appear that the first estimate was insufficient to pay the contract price together with interest, a supplemental assessment might be levied to pay for an estimated deficiency of the cost of the work, "in the same manner, as nearly as may be, as in the first assessment." The section was also amended at the same time so that it states, "that if said estimated deficiency shall exceed ten percentum of the original estimate, then a public hearing shall be had on said supplemental proceeding in like manner as in the original proceedings." (Laws of 1905, p. 103.)

It is earnestly argued by counsel for appellant that the legislature never intended that a public hearing on a supplemental assessment should be held before the contract was signed and before the work was completed; that the legislature did not intend by this provision that the property owner should be entitled to a hearing on the supplemental assessment as to the extent, nature and cost of the improvement as under section 8 in the original proceeding; that the last amendment as to supplemental proceedings, passed in 1905, was intended for the benefit of the contractor and the municipality and not for the benefit of the property owner. We cannot agree with this contention. There can be no question that in construing a statute the principal object is to ascertain and give effect to the intention of the legislature; that the intent of the legislature is the law;

that to ascertain that intent the whole act, together with the law existing prior to its passage, any changes in the law made by the act and the apparent motive for making such changes, will be weighed and considered. This intention is to be gathered not only from the language used but also from the reason and necessity for the enactment, the evils sought to be remedied and the objects and purposes to be attained by it. (*Stribling v. Prettyman*, 57 Ill. 371; *People v. Abbott*, 274 id. 380; *Kehl v. Taylor*, 275 id. 346.) We have no doubt that the legislature passed the amendment of 1905, providing that a supplemental assessment could be levied before the work was done, in order to obviate the effect of the decisions of this court in *City of Chicago v. Richardson*, *supra*, and *Sheriffs v. City of Chicago*, *supra*, holding that a supplemental assessment could not be levied until the work was done, and that this amendment was made for the purpose of protecting the contractor as well as the municipality, but we do not agree with the argument of appellant that it was not also intended to protect the interests and rights of the property owners. This court has held that the purpose of the public hearing as to the original proceeding was to enable property owners to determine whether they would consent to or oppose the contemplated improvement or any of the elements thereof, or propose modifications or changes with reference to the same. (*City of Chicago v. Huleatt*, 276 Ill. 466.) It is true that the municipal authorities are not bound by the wishes or views of property owners expressed at a public hearing, but such hearing is undoubtedly provided to give the public authorities an opportunity of learning from the property owners their wishes in regard to the improvement, and we cannot think, from the wording of the entire Local Improvement act and its amendments, that the legislature intended that the municipal authorities should arbitrarily ignore the expressed wishes of the property owners in regard to a public improvement, if such objections were reasonable

and valid. We think it should be assumed that the legislature intended that the municipal authorities, until after the public hearing was had, would be open-minded on the question whether or not the improvement should be modified or changed or whether it should be abandoned, having in mind not only the needs of the municipality but the interests of the property owners. The manifest object of the law in creating a board of local improvements and providing for the preliminary proceedings before that board was to prevent hasty, ill-advised or secret action by the city authorities, without giving to the property owners whose interests are involved an opportunity to be heard. (*Ogden, Sheldon & Co. v. City of Chicago*, 224 Ill. 294.) A public hearing is to enable the board of local improvements and the property owners to discuss fully, fairly and without prejudice, the kind, character, extent and cost of the proposed improvement. The right to a public hearing is a valid and substantial right, which should not be lightly disregarded or ignored. While it is true that a large and sound discretion rests with the board of local improvements and municipal authorities with reference to the kind and character of the work and the nature of the improvement and that the courts will not interfere with the exercise of such sound discretion by the municipal authorities, still it was the plain intent of the legislature that the original public hearing shall be held for the purpose of giving the property owners an ample chance to be heard and to obtain a full knowledge as to the nature, character and cost of the improvement, and for the purpose of having a full, free and unbiased hearing by the local board of improvements on all of these questions.

Did the legislature, in amending section 59 providing for a public hearing on the supplemental proceeding "in like manner as in the original proceedings," if the estimated deficiency exceeds ten per cent of the original estimate, intend that the public hearing should be held for the

same purpose as the public hearing in the original proceedings under section 8? In our judgment that was clearly the legislative intention. The amendment uses the same phrase, "public hearing," and says it shall be held "in like manner as in the original proceedings." The intention was that at this public hearing the same kind of questions should be considered and be open for discussion, so far as possible, as in the original public hearing,—that is, whether the board should proceed with or abandon the original improvement at the additional cost or change the character to some other improvement. To construe the statute to mean that this hearing may be had after the contract has been awarded and the work done is to defeat the very purpose of a public hearing, but if the hearing is had before the municipality is bound by contract and while it is in position to reject the bids at the additional cost and change the nature and character of the improvement, it will present an opportunity to the property owners to be heard on all those questions. The intention of the legislature in passing this amendment was clearly to allow a public hearing before the work was done, when the estimated deficiency is over ten per cent, so as to give an opportunity to the property owners to protest as to the character and kind of the improvement and whether it ought to be completed as originally intended. For these reasons the county court rightly sustained the objections to this assessment because the public hearing had not been had before the contract was let.

While the precise question here involved was not before the court, the reasoning as to a public hearing on a supplemental assessment in *Village of Winnetka v. Taylor*, 288 Ill. 624, is in accord with the conclusion here reached.

The judgment of the county court will be affirmed.

Judgment affirmed.

(No. 12822.—Judgment affirmed.)

THE PEOPLE *ex rel.* Road District No. 5, Appellee, *vs.*
JAMES E. HEDGES *et al.* Appellants.

Opinion filed October 27, 1919.

1. DRAINAGE—*when drainage commissioners must reconstruct and maintain bridge over public highway.* Where drainage commissioners in constructing a drainage ditch have destroyed a bridge over a public highway the law imposes a duty upon the drainage district to restore the highway for travel by reconstructing and maintaining the bridge.

2. SAME—*road commissioners have no authority to release the drainage commissioners from obligation to restore a bridge.* The commissioners of a road district can exercise only such powers as are conferred on them by statute, and they have no authority to enter into a contract with the commissioners of a drainage district whereby the road commissioners assume the obligation of restoring a bridge which the drainage commissioners have destroyed in constructing a ditch across a public highway.

3. SAME—*drainage commissioners may make additional assessment if without funds to re-build bridge.* If drainage commissioners are without funds to re-build a bridge which they have destroyed in constructing a ditch across a public highway the law affords them authority to raise the necessary money by an additional assessment.

APPEAL from the Circuit Court of Alexander county;
the Hon. WILLIAM N. BUTLER, Judge, presiding.

A. NEY SESSIONS, and CHARLES E. FEIRICH, for appellants.

GEORGE B. BAKER, and WILLIAM S. DEWEY, (MILES SAFFORD GILBERT, of counsel,) for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

North Alexander County Drainage District was organized under the Levee act in 1910 and commissioners were duly appointed. The main ditch of the district, which the plans and profiles provided should have a fifty-foot base and a one-to-one slope on each side, with a fall of one and one-

tenth feet per mile, crossed a public highway known as the Cape Girardeau and Jonesboro road at a place where there was a bridge built and maintained by the road authorities. The parties are not agreed as to whether the bridge was over a natural stream or an artificial channel, but it is agreed the bridge was about fifty feet long and was used by the public traveling over the highway. The bridge was destroyed by the drainage commissioners and the stream or channel it crossed was enlarged so that a new bridge ten feet longer than the old one would be required. The drainage commissioners refused to build a new bridge across the drainage ditch, and the public was prevented from use of the highway at that place because the ditch could not be crossed there. A year or more after the drainage commissioners had removed the bridge, the People, at the relation of Road District No. 5, Alexander county, filed a petition for a writ of *mandamus* to compel the drainage commissioners to build and maintain a bridge along said highway at the point where the drainage ditch crosses said highway. The petition alleged the organization of the drainage district; that the main ditch crossed said highway, which had been maintained and used as a public road for thirty years; that at the place where the ditch crossed the public highway it was in a small creek, which was enlarged to meet the requirements of the drainage district; that a bridge over said stream, which was built and maintained by the road district authorities as part of the highway for use of the public, was removed by the drainage commissioners and a larger one would be required by reason of the enlargement of the channel, wherefore it became the duty of the drainage district to build and maintain a bridge over its ditch.

The answer of the drainage commissioners admits the organization of the drainage district and that they constructed the ditch across the public highway, but denies the ditch takes the place of a small creek where it crosses the road and alleges the bridge was over an artificial channel.

The answer admits the removal by the drainage commissioners of the bridge of the road district and that the ditch cannot be crossed by the traveling public, denies it is the duty of the drainage district to construct a bridge over its ditch but alleges that duty devolved upon the road district. The answer avers it was the duty of the drainage commissioners, before letting the contract for the work and before return of the assessment roll of benefits and damages, to endeavor to procure a right of way for the main ditch by agreement and procure releases of damages on account of the proposed work, and that under the direction of the county court the drainage commissioners on June 1, 1914, entered into a contract with the road district, which is set out in full in the answer. The substance of the agreement is that the road district was within the boundaries of the drainage district; that the plats, plans, profiles and specifications on file in the county court show the proposed ditches and levees in some instances cross public highways and run along and upon such highways within Road District No. 5; that said road district should be allowed in the assessment roll of benefits and damages one dollar, and that the drainage district should at its own expense provide a certain right of way for a public highway where the road was used for ditch purposes, remove therefrom all stumps, trees and underbrush and put it in fit condition for travel for use by the public perpetually; that the road district on its part agreed that upon the performance by the drainage district of its agreement the road district would accept the same in satisfaction of compensation and damages to the road district, including the necessary interruption of traffic while the ditches were being dug and the levees constructed. The answer avers the execution of said agreement was authorized by the highway commissioners of said road district at a regular meeting; that the drainage commissioners were authorized by the Levee act to make the agreement and that it was valid and binding upon both parties, and by

it the drainage district is relieved from any obligation to build the bridge upon the performance of its agreement, and avers it fully and completely performed all of its part of the agreement; that the road district had accepted the benefit of said agreement more than a year before filing the petition. The answer further avers that July 7, 1914, and after the execution of said agreement, the commissioners' roll of benefits and damages was filed in the county court, wherein there was set down in proper columns the amount of damages allowed the road district; that a jury was empaneled, a hearing had and verdict returned, which was confirmed by the court, and that said road district, although duly notified as required by law, made no objection. The answer further avers the drainage district has no funds with which to construct a bridge and has no power to raise funds for that purpose unless directed by the county court to make an additional assessment. The answer denies it is the duty of the drainage district to construct the bridge, and avers the district can only respond in damages but cannot be compelled to replace the bridge.

The commissioners of the road district demurred to the answer, generally and specially. The court sustained the demurrer, and the drainage commissioners electing to stand by their answer, the peremptory writ of *mandamus* was ordered issued as prayed. The drainage commissioners appealed from the judgment.

Two principal questions raised are (1) whether, under the law, it was the duty of appellants to re-build the bridge or whether that duty rested on appellee; (2) whether, if the law made it the duty of appellants to build the bridge, by the agreement set out in the answer appellee released appellants from that duty. That in such cases the law imposes the duty upon the drainage district to restore the public highway for travel by reconstructing the bridge has been decided in *Highway Comrs. v. Lake Fork Drainage District*, 246 Ill. 388; *People v. Fenton and Thomson Railroad*

Co. 252 id. 372; *People v. Block*, 276 id. 286; *Brougher v. Lost Creek Drainage District*, 277 id. 156.

It is earnestly contended that by the agreement set out in the answer appellee voluntarily assumed the obligation of building the bridge and released appellants from any liability on that account. It is insisted that the Levee act, under which the drainage district was organized, authorized appellee and appellants to enter into said agreement, and that it is a valid and binding agreement. We do not construe the agreement to be intended as a release of damages by appellee on account of the destruction of the bridge and an agreement on its part to assume the obligation and burden of replacing it. That does not seem to us to have been within the contemplation and intent of the parties. Even if it was, it was beyond the power and authority of road commissioners, who are statutory officers and can exercise only such powers as are conferred on them by statute. (*Ohio and Mississippi Railway Co. v. People*, 123 Ill. 648; *Townsend v. Gash*, 267 id. 578.) Highway commissioners have no authority to levy a tax to build a bridge in such cases but that burden must be borne by the drainage district. (*Highway Comrs. v. Lake Fork Drainage District*, *supra*; *People v. Fenton and Thomson Railroad Co.* *supra*.) The law imposed the duty upon appellants to restore the bridge, and appellee had no power or authority to enter into a contract that it would assume that obligation and relieve appellants therefrom.

It is also objected that the judgment was erroneous for the reason that the answer averred, and the averment was admitted by the demurrer, that appellants were without funds to build the bridge. The law affords appellants authority to raise the necessary money by an additional assessment, if necessary. *Sny Island Levee Drainage District v. Shaw*, 252 Ill. 142.

Lastly, it is contended the court erred in ordering that appellants maintain the bridge. We understand the judg-

ment in this respect was in accordance with the law. *Highway Comrs. v. Lake Fork Drainage District, supra.*

The judgment is affirmed.

Judgment affirmed.

(No. 12751.—Judgment affirmed.)

THE T. WILCE COMPANY, Appellant, *vs.* THE ROYAL INDEMNITY COMPANY, Appellee.

Opinion filed October 27, 1919.

1. **BONDS**—*when application for indemnity bond forms part of the contract.* An application for a bond of indemnity against loss through the dishonesty of an employee, which contains written answers by the employer to questions concerning the business and the employee, forms a part of the contract of indemnity, where the bond provides that "certain statements in writing relative to the employee and to other things connected with this bond" shall be a part of the agreement, and in a suit on the bond the employer can not allege want of knowledge as to the truth of said statements.

2. **SAME**—*what defense is available under general issue.* Where the application for a bond of indemnity against loss through the dishonesty of an employee contains written answers by the employer to questions concerning the employee and is made a part of the contract of indemnity, in a suit on the bond the plaintiff is not bound to set out in the declaration the statements made by it to procure the bond or to prove the truth of the statements, but such facts are matters of defense available to the defendant under a plea of the general issue, with notice of special matters to be proved and relied upon.

3. **PRACTICE**—*when court may amend form of verdict at subsequent term.* Where the jury returns a verdict finding the issues for the plaintiff but assessing the "defendant's" damages at a certain sum, and a motion for a new trial is made and continued to the next term, the court has power to correct the mistake in the verdict at the subsequent term before overruling the motion for a new trial and entering judgment.

APPEAL from the First Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ROBERT E. CROWE, Judge, presiding.

BULKLEY, MORE & TALLMADGE, for appellant.

THOMAS BATES, and SEYMOUR EDGERTON, for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

Appellant, as plaintiff, sued appellee on a bond given by appellee to indemnify appellant against loss through the dishonesty of William E. Aten, an employee of the appellant, while in the performance of his duties as cashier and head book-keeper of appellant for the period between April 1, 1913, and April 1, 1915. The bond was to indemnify appellant from loss through the fraud or dishonesty of Aten to an amount not exceeding \$10,000. Appellant recovered a judgment in the circuit court for \$169.86, which on appeal to the Appellate Court was affirmed. . A certificate of importance having been granted, plaintiff below has prosecuted an appeal to this court.

Appellant is a corporation engaged in the manufacture of hardwood flooring. Aten had been continuously in its employ since 1906. Early in March, 1913, Aten made application to appellee to furnish a surety bond for him to his employer in the sum of \$10,000. Thereupon appellee requested appellant to make a statement in answer to certain inquiries about information appellee desired concerning Aten, on a blank form prepared and furnished for that purpose. Answering the questions on said form, appellant stated it was a corporation engaged in manufacturing hardwood flooring and that Aten was its cashier and head book-keeper and that it would pay the premium for the bond. Appellant further stated in answer to questions, that Aten would be required to deposit in the bank, to the account of the appellant, all cash received each day except \$25 to \$50 for change. The questions and answers in said statement, from 12 to 16, inclusive, are as follows:

- 12.—(a) At what intervals will applicant's books, accounts, stocks and securities be inspected and audited and verified with funds on hand or in bank? (a) 1st of each month.
- (b) * * * * *
- (c) * * * * *
- (d) By whom will above audits and inspection be made? (d) W. M. Davis, Clerk.
- 13.—(a) When were applicant's accounts last examined? (a) March 1st.
- (b) Were they at that time in every respect correct? (b) Yes.
- 14.—(a) Has applicant always faithfully, honestly and punctually accounted to you for all moneys and property heretofore under his control or custody as your employee? (a) Yes.
- (b) Are applicant's accounts at this date in every respect correct, and proper securities, property and funds on hand to balance his accounts? (b) Yes.
- 15.—(a) Is applicant now in debt to you? (a) No.
- (b) * * * * *
- 16.—Have you ever sustained loss through the dishonesty of anyone holding the position of the applicant or holding a similar position? No.

To this statement is appended the following:

"It is agreed that the above answers shall be warranties, and shall constitute the basis of and form a part of said bond applied for, or any other bond that may be executed by the Royal Indemnity Company to the undersigned upon applicant above named, in said position, or any renewal or continuation of such bond.

"Dated at Chicago, Ill., this 7th day of March, 1913.

(Seal.)

THE T. WILCE CO., *Employer.*
E. HARRY (HARVEY) WILCE,
Official Capacity, Prest."

Upon receipt of the statement of appellant, appellee issued the indemnity bond sued on. The bond bears date of March 12, 1913, and among its provisions are that appellant (the employer) had delivered to appellee "certain statements in writing relative to the employee and to other things connected with this bond, which, together with any other statements in writing hereafter made by the employer to the surety relative to any such matters, are and shall be a part of this agreement (hereinafter called the bond) or any continuation or continuations hereof and shall be deemed warranties. * * * Now, therefore, in consideration of the warranties aforesaid and of the payment of the premium of seventy-five 00/100 dollars, it is hereby agreed that, subject to the terms, conditions and limitations set forth in this bond, compliance with which shall be a condition precedent to the right of the employer to recover hereunder, the surety will make good to the employer such pecuniary loss of the employer's money, funds or other personal property, not exceeding ten thousand 00/100 dollars, as shall be sustained by the employer by any act or acts of fraud or dishonesty committed by the employee personally during the period" covered by the bond.

In April, 1914, appellant notified appellee that Aten was short in his accounts, and, after causing an audit to be made of his books, demanded of appellee \$8423.33. It was disclosed by investigation that prior to making the statements by appellant to appellee and the issuing of the bond sued on, Aten was a defaulter to appellant in the sum of about \$19,000 and that his shortage began soon after entering appellant's employment. In addition to the audit of Aten's books by appellant, appellee also caused them to be audited by accountants employed by it, and it is undisputed that at the time the bond became effective, April 1, 1913, Aten had appropriated in round numbers \$19,000 of his employer's money and had concealed it from his employer by a system of fictitious book-keeping.

The declaration in the suit filed by appellant against appellee contained two special counts and the common counts. The declaration was filed in October, 1914. On November 12, 1914, before pleading to the declaration, the appellee tendered appellant the amount of premium paid for the bond and its renewal, and interest on the premium, a total of \$159, which the appellant refused to accept. Appellee pleaded the general issue, with notice that on the trial it would prove in defense certain matters particularly set out. The substance of the special matters proposed to be proved was that the answers, or at least some of them, made by appellant to appellee about Aten before the bond was given, and claimed to be warranties, were false. The notice stated appellee would also prove it had tendered appellant the full amount of premium paid for the bond and the renewal, and interest thereon, and that the same was a continuing tender.

The greater portion of appellant's argument is devoted to the propositions that the statements made by appellant in the paper called defendant's "Exhibit A," being the information asked of the employer of Aten by appellee before issuing the bond, are not part of the bond because not in any way identified by anything in the bond as part thereof, and that they can only be connected with the bond by extrinsic parol evidence; that appellee not having by special pleas denied the contract sued on and set out in the declaration, was estopped to offer said exhibit as part of the instrument sued on; that, even if said exhibit be construed as part of the bond, there is nothing in that paper or the bond to show the parties intended, if it should be discovered that Aten was a defaulter at the time the bond was made, that that fact should render the bond void *ab initio*; and also that the exhibit is a collateral document not admissible in evidence as a defense of fraud, because the bond is a sealed instrument.

In *Treat v. Merchants Life Ass'n*, 198 Ill. 431, the court said: "The application for the insurance is referred to in

the insurance contract and made a part thereof, and under the repeated decisions of this and other courts it is binding upon the beneficiaries named in the policy. Where the intent to make the application a part of the policy clearly appears, the court, no matter what the phraseology may be, will read the application into the contract of insurance and construe the contract of insurance and the application together,"—citing authorities.

In *United States Fidelity and Guaranty Co. v. First Nat. Bank*, 233 Ill. 475, it was said that a bond of a guaranty company to indemnify employer against loss from dishonesty of an employee is an insurance contract and subject to the rules applied to insurance policies generally, and not the rules applied to sureties for accommodation.

In *Spence v. Central Accident Ins. Co.* 236 Ill. 444, the court considered whether the statement by the insured of his age in his application for a policy was a warranty or a representation. The statement was not in the policy nor was it by reference thereto made part of the policy. It was held not to be a warranty, but the court said: "The usual method adopted by insurance companies to make the statements and stipulations embraced in the application a part of the policy is to refer to the application and by express terms make it a part of the contract, or they are declared to be the basis upon which the contract is made, or the policy is declared to be issued upon the faith thereof. (May on Insurance,—2d ed.—sec. 158.) Where this course is pursued there is no room for doubt."

Appellant expressly agreed that its answers in "Exhibit A" should constitute the basis of and form part of the contract for the bond applied for or any renewal of it. The bond itself refers to the exhibit as "certain statements in writing relative to the employee and to other things connected with this bond," together with other statements in writing made by the employer to the surety, and says they "shall be a part of this agreement" and "shall

be deemed warranties." The bond further states that "in consideration of the warranties aforesaid" and the payment of the premium, appellee agrees, subject to the conditions and terms set forth, to make good to appellant any loss of money through the fraud or dishonesty of the employee, not exceeding \$10,000.

It will be seen by the portion of "Exhibit A" above set out that appellant stated the books and accounts of Aten would be inspected, audited and verified with the funds on hand or in bank the first of every month; that this would be done by W. M. Davis, who was also an employee of appellant; that Aten's accounts were last examined the 1st of March and were in every respect correct; that Aten had always honestly and punctually accounted for all moneys in his control or custody; that Aten was not indebted to appellant, and that appellant had never sustained loss through the dishonesty of anyone holding Aten's position. Aten's books and accounts had not been inspected, audited and verified March 1, and were not inspected, audited and verified by W. M. Davis or anyone else the first of each month after the bond was issued. At the time the statements were made Aten had embezzled \$19,000 of appellant's money. The statements made by appellant were untrue. Obviously, the information contained in the statements was of vital importance in inducing appellee to execute the bond. Some of the statements must have been known by appellant to be untrue, and as to others, whether known by appellant to be untrue or not, it assumed knowledge of the facts and can not now allege want of knowledge. (*Hartford Life and Annuity Ins. Co. v. Gray*, 91 Ill. 159.) Clearly, under the decisions in this State the statements formed a part of the contract. Appellee did not deny the execution of the contract, but it denied it was bound by it because of the false warranties which formed a part of it. Appellant was not required to set out in its declaration the statements made by it to procure the bond to be executed or to prove the

truth of the statements. (*Phoenix Ins. Co. v. Stocks*, 149 Ill. 319.) This was matter of defense and was available to appellee under the general issue and notice of special matters to be proved and relied on as a defense. The court did not err in admitting in evidence "Exhibit A." *Gould v. Magnolia Metal Co.* 207 Ill. 172.

There was no reversible error in the court's rulings in the admission of testimony to prove that Aten was in default to appellant prior to March 7, 1913. This proof was made, in part, by the testimony of accountants who had examined his books and gave the result of their examination. It is very possible some questions and answers were objectionable, but in the main we find no meritorious cause of complaint. There can be no doubt Aten was a defaulter several thousands of dollars when the application for the bond was made. The president of appellant testified Aten confessed to him his defalcations in April, 1914, and how he managed to conceal them, and it is undisputed his speculations had been carried on several years before the bond was given.

There was no reversible error in the action of the trial court in giving the three instructions on behalf of appellee.

The court submitted to the jury two forms of verdict. One form was, if they found the issues for the plaintiff to assess the plaintiff's damages "at the sum of dollars." The other form, if they found for defendant, was simply, "We, the jury, find the issues for the defendant." The verdict returned by the jury found the issues for the plaintiff and assessed "the defendant's damages at the sum of \$150, with interest thereon from October 15, 1914, to date, amounting to \$19.86, and including costs of suit." The court overruled a motion by appellee to cause the jury to retire to correct their verdict, and appellant thereupon entered its motion for a new trial. The verdict was returned and motion for new trial made on June 8, 1917, which was during the June term of court. The motion was

not then acted upon but was continued to the July term, at which term the court corrected the verdict to read, "assess the plaintiff's damages at the sum of \$169.86." The court then overruled the motion for a new trial and rendered judgment for appellant on the verdict as corrected, for \$169.86. These rulings of the court, appellant insists, were erroneous and without warrant of law. We think it apparent to reasonable minds that the jury meant and intended to assess plaintiff's damages at the amount of the premiums paid, which were \$150 and interest thereon. Appellee admitted liability in that sum and had tendered payment. The defalcation of Aten for the period covered by the bond and its renewal was proved to be several thousand dollars. It is plain from the verdict that the jury did not find appellee liable for any part of Aten's shortage. While they found the issues for the plaintiff and the damages recoverable were \$150 and interest, they inadvertently assessed the damages as defendant's damages instead of plaintiff's. Clearly, after finding the issues for the plaintiff the jury could not have intended to assess damages against it in favor of defendant, in face of the fact that defendant admitted its liability to plaintiff for the premiums paid and interest thereon. What the jury's verdict meant was that the jury found the issues for the plaintiff and assessed its damages against the defendant, and not that it assessed damages in favor of defendant against plaintiff, in whose favor the issues were found. The court should have allowed appellee's motion that the jury retire and put their verdict in form, but we have no doubt of the power and authority of the court to put the verdict in form. While that action of the court was not at the term at which the verdict was returned, the motion for a new trial was made at that term and continued to the next term. No judgment was rendered on the verdict until after it had been put in form by the court, and the court did not lose jurisdiction. (*Italian-Swiss Agricultural Colony v. Pease*, 194 Ill. 98.)

The verdict contained the substance of a good return and the court had power to amend it in matter of form. *Law v. Sanitary District of Chicago*, 197 Ill. 523.

The judgment is affirmed.

Judgment affirmed.

(No. 12485.—Decree affirmed.)

ANGELINE FARMER *et al.* Plaintiffs in Error, *vs.* ADDA JANE DAVIS *et al.* Defendants in Error.

Opinion filed October 27, 1919.

1. WILLS—*what does not tend to prove undue influence.* The mere fact that the testatrix, when the will was made, was at the home of her niece, who was made principal beneficiary, does not, alone, tend to prove the charge of undue influence of the beneficiary.

2. SAME—*what undue influence will invalidate a will.* Undue influence that will invalidate a will must be of such character as to deprive the testator of free agency, must be directly connected with the execution of the instrument and be operating at the time it is made, producing a perversion of the mind that made the will.

3. SAME—*prejudice against relatives does not amount to insane delusion.* An insane delusion is a belief in something impossible under the circumstances and which refuses to yield either to evidence or reason; and the fact that a person making his will distributes his property unequally among the natural objects of his bounty because of prejudice or unfriendliness towards some and affection for others does not establish that he labored under an insane delusion toward relatives for whom little or no provision is made.

4. SAME—*age, sickness or debility will not, alone, affect capacity to make will.* Neither age, sickness nor debility of body will affect the capacity to make a will if sufficient intelligence remains.

5. SAME—*when decree will not be reversed because of inaccuracies in instructions.* Courts of review reverse for only such errors as may have been prejudicial to the party complaining, and in a will contest case where there is no reason to believe a different verdict and decree might have resulted if none of the instructions complained of had been given, and where the evidence warrants the verdict, the decree will not be reversed for inaccuracies in instructions.

WRIT OF ERROR to the Circuit Court of Moultrie county;
the Hon. GEORGE A. SENTEL, Judge, presiding.

REDMON, HOGAN & REDMON, C. R. PATTERSON, and
E. J. MILLER, for plaintiffs in error.

JENNINGS & ELDER, EDWARD C. CRAIG, DONALD B.
CRAIG, and JAMES W. CRAIG, JR., for defendants in error
Adda Jane Davis and C. S. Edwards, Admr.

ALBERT M. ROSE, for defendant in error Sarah J. Elzy.

Mr. JUSTICE FARMER delivered the opinion of the court:

This writ of error was sued out to review a decree of the circuit court of Moultrie county sustaining the validity of the will of Jane Freeman Spaugh, who died testate March 24, 1916. After the will was admitted to probate the bill to contest it was filed by the two sisters of the testatrix, Angeline Farmer and Mary Ann Jones, and Joseph T. Steele, a nephew. The only other heirs-at-law of the testatrix, Adda Jane Davis, a niece, Edward W. Steele, a nephew, and Sarah J. Elzy, a niece, were made defendants. Before the trial Mary Ann Jones died testate, leaving her husband, Amos Jones, sole devisee and legatee. An amended bill was filed, in which Amos Jones, in his individual capacity and as executor of the will of Mary Ann Jones, was made a defendant. The bill alleged the testatrix did not possess testamentary capacity, that the will was the result of an insane delusion, and that it was procured through the undue influence of Adda Jane Davis, the principal legatee.

The will was executed June 28, 1915. The testatrix was about eighty years old and was confined to her bed at the home of Mrs. Davis at the time. The will was prepared by two members of the Moultrie county bar, who went to the home of Mrs. Davis pursuant to information from Mrs. Davis' husband that Mrs. Spaugh wanted to see them. Both of them signed as attesting witnesses. The testatrix

had real and personal property of the value of \$12,000 or \$15,000. By her will she bequeathed \$25 to each of her two sisters and \$1000 to Mrs. Davis. The fifth clause of the will directed that after the payment of these bequests and the debts the remainder of testatrix's personal property be equally divided between her two nieces, Mrs. Davis and Sarah J. Elzy. By the sixth clause she devised all of her real estate to Mrs. Davis, "upon condition that the said Adda Jane Davis shall furnish me with a comfortable home from this date until my death and shall also give me suitable care and such attention as my declining health requires, and this bequest is also made in full payment of all services heretofore rendered to me by my said niece, Adda Jane Davis." The only real estate the testatrix had title to at the time the will was executed was a ten-acre tract of farm land occupied by Cloyd Freeman, her step-grandson, as tenant, which was worth \$3000 or \$4000. Mrs. Spaugh had foreclosed a mortgage on a lot in Kirksville, on which there was a building, and had bought the property at the sale. The period of redemption had not expired when the will was executed but it did expire before her death and she received a master's deed for the property, which was worth about \$500 or \$600.

The issues of fact submitted to the jury were: (1) Was the writing offered in evidence the last will and testament of Jane Freeman Spaugh? (2) Was she at the time of its execution of sound mind and memory? (3) Was she under the improper restraint and undue influence of Adda Jane Davis? (4) Was she acting under an insane delusion toward Mary Ann Jones to such an extent that she was thereby rendered incompetent to make a just and proper distribution of her estate? The jury found for the proponents on all the issues, and the court, after overruling a motion to set aside the verdict and grant a new trial, entered a decree sustaining the validity of the will. A written motion for a new trial was filed by contestants, specify-

ing eleven grounds in the motion, among them the admission of improper and the rejection of proper evidence, giving improper and refusing proper instructions, giving too many instructions for proponents, that the verdict was contrary to the evidence and contrary to law. Six errors are assigned on the record, only three of which are argued in contestants' brief. They are, that the court erred in giving too many instructions for proponents, that the court gave erroneous instructions for proponents, and that the court erred in entering a decree contrary to law.

The sixth error assigned is that the decree is contrary to the law and evidence, but counsel for contestants say in their brief that the evidence on the issues was sharply conflicting, and the errors in instructions, in the opinion of counsel, are so palpable and grave that their brief will be devoted to a discussion of "errors of law committed by the court." Counsel in effect concede that the state of the evidence is such that a court of review could not reverse the decree on the ground that the verdict was contrary to the evidence, but claim that the testimony being conflicting, contestants were prejudiced by the court's action in giving erroneous instructions for proponents. Proponents insist that by not assigning as error the action of the court denying the motion to set aside the verdict and granting a new trial contestants admit the verdict was right under the evidence, that the court properly overruled the motion for a new trial, and that no question of the weight of evidence is presented for our consideration. Being unwilling to dispose of the case upon that proposition alone, which appears to be supported by authority, without investigating the merits of the case, we have examined the evidence and the instructions and have arrived at the conclusion that on the merits the decree must be affirmed. While there is some conflict in the testimony, we do not regard it as close on any of the issues tried. We are convinced the verdict was amply supported by the weight of the testimony, and it is

not claimed that any improper or incompetent evidence was admitted or that proper and competent testimony was rejected. There was scarcely a scintilla of evidence to support the charge of insane delusion or undue influence, and the weight of the testimony was that the testatrix possessed testamentary capacity.

We shall not attempt a full statement of the evidence. The will was executed June 28, 1915. Mrs. Spaugh was about eighty years old and died March 24, 1916. She had been married four times but had no children. Two of her husbands died and she was divorced from two. For more than twenty years prior to 1915 she and Mollie Powell, a girl she raised from the time she was seven years old, lived together. In January, 1915, they had a quarrel and testatrix went to the home of her sister Mary Ann Jones. While there a proceeding was begun, as we understand it, by the husband of Mrs. Jones for the appointment of a conservator for Mrs. Spaugh. She employed her own counsel to resist the appointment and a trial resulted in her favor. After that suit had been instituted, and before the trial, Mrs. Spaugh was taken by Adda Jane Davis to her home. During the trial of the conservator case, and for six weeks thereafter, Mrs. Spaugh stayed at the home of Cloyd Freeman, the grandson of a deceased husband of testatrix. Freeman was then occupying as tenant the ten acres of land owned by her. While staying at Freeman's Mrs. Spaugh sent for her business agent and a lawyer to assist her in making her will. This was in March, 1915. A will was prepared by the lawyer in accordance with the directions of Mrs. Spaugh as to how she desired to dispose of her property. That will made precisely the same bequests to the two sisters of testatrix as the last will. By it the ten acres of land was given to the step-grandson, Cloyd Freeman, and \$25 each to two nephews, Joseph and Edward Steele. By the last will no bequest was made to Joseph and Edward Steele, and the ten-acre tract of land was

given to Adda Jane Davis upon condition that she furnish the testatrix a comfortable home until her death. Mrs. Spaugh and Freeman could not get along agreeably, and after remaining at his home about six weeks she was at her request taken to the home of Mrs. Davis, where she remained until her death. While living at Mrs. Davis' house Mrs. Spaugh sent for two lawyers of the Moultrie county bar to prepare another will for her, and the will then executed is the will now being contested.

There is no proof of any acts or conduct of Mrs. Davis to induce Mrs. Spaugh to make the will. The mere fact that Mrs. Spaugh was at Mrs. Davis' house when the will was made and that Mrs. Davis was the principal beneficiary does not tend to prove the charge of undue influence. Undue influence that will invalidate a will must be of such character as to deprive the testator of free agency and render the act the offspring of the will of others, and the undue influence must be directly connected with the execution of the instrument and be operating at the time the will is made, producing a perversion of the mind that made the will. (*Snell v. Weldon*, 239 Ill. 279; *Larabee v. Larabee*, 240 id. 576; *Roe v. Taylor*, 45 id. 485.) The proof wholly failed to meet these requirements, as it also failed upon the charge of insane delusion. The bill alleged that Mrs. Davis exercised great influence over the mind of testatrix, and by reason of her sick and weakened condition sought to, and did, prejudice the mind of testatrix, prior to the making of the will, against her other relatives, and especially her sister Mary Ann Jones, so that she was not capable of making a fair, impartial and proper distribution of her estate. Evidence was introduced tending to show Mrs. Spaugh was incensed at her sister Mrs. Jones about the attitude of the Jones family in trying to get a conservator appointed for her, and that she said she did not want Mrs. Jones to have much share in her property. It does not appear that the sister Mrs. Farmer had anything

to do with the conservator proceedings. Both sisters were given an equal amount (\$25) by the will. Conceding Mrs. Spaugh became very unfriendly with and prejudiced toward Mrs. Jones, that would not amount to an insane delusion, if, notwithstanding such prejudice, Mrs. Spaugh knew and appreciated her property, the natural objects of her bounty, and understood and knew how she desired to dispose of her estate.

That a person making his will distributes his property unequally among the natural objects of his bounty because of prejudice or unfriendliness towards some and affection or friendship for others does not establish that he labored under an insane delusion toward relatives as to whom slight provision or no provision at all is made. "An insane delusion is a belief in something impossible in the nature of things or impossible under the circumstances surrounding the afflicted individual and which refuses to yield either to evidence or reason." (*Scott v. Scott*, 212 Ill. 597.) "Insane delusion consists in the belief of facts which no rational person would have believed." (*Schneider v. Manning*, 121 Ill. 376.) "Unreasonable prejudice against relatives is not ordinarily a ground for invalidating a will, but a will may be set aside where the testator's aversion is the result of an insane delusion and his conduct cannot be explained on any other ground." (*Nicewander v. Nicewander*, 151 Ill. 156.) This court in *Owen v. Crumbaugh*, 228 Ill. 380, said: "A belief which results from a process of reasoning from evidence, however imperfect the process may be or illogical the conclusion, is not an insane delusion. An insane delusion is not established when the court is able to understand how a person situated as the testator was, might have believed all that the evidence shows that he did believe and still have been in full possession of his senses."

The greater part of the evidence heard was on the issue of unsoundness of mind. A number of witnesses,—more than twenty on each side,—testified upon the question, and,

as is usual in such cases, their testimony was conflicting, but we think the testimony of the witnesses for the proponents was much stronger and more convincing than the testimony of contestants' witnesses. It is true, the evidence showed age and disease had weakened Mrs. Spaugh physically and mentally, but the weight of the evidence was that she possessed sufficient mental capacity to knowingly and understandingly dispose of her property by will and that she did distribute her estate to those to whom she desired it to go. It would serve no useful purpose to state in this opinion the substance of the testimony upon the issue of testatrix's mental capacity. It has always been held that neither age, sickness nor debility of body will affect the capacity to make a will if sufficient intelligence remains. *Woodman v. Illinois Trust and Savings Bank*, 211 Ill. 578; *Pooler v. Cristman*, 145 id. 405; *Rutherford v. Morris*, 77 id. 397.

The verdict of the jury and the decree are supported by the weight of the testimony, and in this condition of the record the errors in the instructions complained of are not of such serious and prejudicial character as to justify a reversal of the decree. One or two of the five instructions complained of may be subject to criticism, but where the evidence warrants the verdict a decree will not be reversed for inaccuracies in instructions. There is no reason to believe a different verdict and decree might have resulted if none of the instructions complained of had been given. Courts of review reverse for only such errors as may have been prejudicial to the party complaining. *Heckle v. Grewe*, 125 Ill. 58; *Pahlman v. King*, 49 id. 266; *Watson v. Woolverton*, 41 id. 241; *Curtis v. Sage*, 35 id. 22.

The decree of the circuit court is affirmed.

Decree affirmed.

(No. 12186.—Judgment affirmed.)

JOHN J. HANRAHAN, JR., Defendant in Error, *vs.* THE CITY OF CHICAGO *et al.* Plaintiffs in Error.

Opinion filed October 27, 1919.

1. **NEGLIGENCE**—*the question whether insanity resulted from injuries is for the jury.* Where there is evidence fairly tending to show that the plaintiff's insanity resulted from the injuries sued for, the question whether the insanity did result from such injuries is for the jury to finally determine upon proper instructions and is not a question of law, and the Supreme Court is concluded by the judgment of the Appellate Court affirming that of the trial court.

2. **SAME**—*when a city is not liable for negligent acts of its officers.* A city is not liable for the negligent acts of its officers or employees who are acting under the police power granted to the city or who are endeavoring to carry out the regulations of the city for the public health, nor for its officers' negligence while exercising judicial, discretionary or legislative authority conferred by its charter or while discharging duties imposed solely for the benefit of the public.

3. **SAME**—*when a city is liable for failure to keep its streets in safe condition.* Where a municipal corporation is acting, within its authority, in a ministerial capacity in the management of its property or in the discharge of its duties in repairing or removing obstructions from streets, or is negligent in failing to discharge its duties of keeping its streets in repair and in safe condition for travel, it is liable for all injuries caused by such negligence when the injured party was exercising due care for his safety.

4. **SAME**—*city acts ministerially in removing obstructions from streets.* A city acts judicially when it selects and adopts a plan for the construction of a public improvement, but in carrying out such plan or in removing obstructions or dangers from its streets it acts ministerially and is bound to see that the work is done in a reasonably safe and skillful manner.

5. **SAME**—*city cannot allow streets to be incumbered with dangerous awnings.* The positive duties of incorporated cities require them to keep their streets in a reasonably safe condition for travel and to remove all obstructions and dangers below, on and above the surface of the streets, including dangerous awnings and other overhead structures, and for failure to exercise due care in discovering and removing the same the city is liable for personal injuries occasioned thereby.

6. *SAME—when an expert witness may testify that insanity resulted from injuries.* Where there is no dispute as to the manner or cause of the injury and no dispute that there was an injury sustained by reason of the acts for which complaint is made, a physician may testify that a later malady was or was not caused by the accident without invading the province of the jury, and where a plaintiff suing for damages for an injury to his head has become insane after the accident, the court may permit an expert witness to testify that the insanity resulted from the injury.

WRIT OF ERROR to the First Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

SAMUEL A. ETTELSON, Corporation Counsel, WILLIAM H. DEVENISH, and CHARLES R. FRANCIS, (ROBERT H. FARRELL, and EDWARD J. KELLEY, of counsel,) for plaintiffs in error.

EARL J. WALKER, and JAMES D. POWER, for defendant in error.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

This writ of error is prosecuted to review the judgment of the Appellate Court for the First District affirming a judgment of the superior court of Cook county in the sum of \$5000 in favor of John J. Hanrahan, Jr., against the city of Chicago. The recovery is for personal injuries alleged to have been sustained by defendant in error through the negligence of the city in permitting a wooden awning on a building located at the southwest corner of Stony Island avenue and Sixty-seventh street to be and remain in a defective condition. The suit was brought against the city of Chicago and F. Salter & Co., a corporation, jointly. At the close of the plaintiff's evidence the jury was instructed to find the defendant F. Salter & Co. not guilty. The city of Chicago will be hereafter referred to as plaintiff in error.

The declaration consisted of two counts, and in substance charged that on and prior to December 12, 1903, F. Salter & Co. was the owner of and in possession and control of a certain building situated on the west side of Stony Island avenue, immediately south of Sixty-seventh street; that there was an awning attached to and connected with and constituting a part of said building, which extended out from the building and above and over the sidewalk on Stony Island avenue, under which pedestrians were accustomed to walk in passing upon and along said walk; that plaintiff in error is a municipal corporation and as such was in possession and control of said streets at said times and that they were public streets, and was also in possession and control of such sidewalk; that long prior to and up to December 12, 1903, the city of Chicago and F. Salter & Co. wrongfully and negligently permitted said awning to be and remain in such a defective, old, rotten, weak and dilapidated condition that it was liable to fall upon pedestrians walking upon the sidewalk, which condition rendered the awning a nuisance; that plaintiff in error knew, or by exercise of ordinary care in that behalf would have known, of the defective and dangerous condition of the awning on and prior to and at the time of the injuries to defendant in error; that defendant in error, an employee of plaintiff in error, while in the course of his employment and while walking southward upon said sidewalk under said awning, in the exercise of due care and caution for his safety, was injured by the awning falling upon him in consequence of its defective and dangerous condition, whereby he sustained permanent injuries, etc. Plaintiff in error demurred to the declaration, and the cause was tried upon the issues formed on a plea of the general issue to the declaration.

The evidence disclosed that at the time of his injuries the defendant in error was about eighteen years of age. He was in the employ of the plaintiff in error, working

on an intercepting sewer then in the course of construction along Stony Island avenue. The awning referred to in the declaration was constructed of pine, extending the full length of the building and out over the sidewalk a distance of about ten feet and about ten feet above the sidewalk. It had been constructed ten years or more and at the time of the injury was rotten and decayed, and the proof tended to show that that condition had existed since the spring of 1903, several months prior to the injuries, which occurred December 12, 1903. On the day of the injuries it was snowy and windy. Defendant in error and his father were both struck and knocked down upon the sidewalk by the falling of the awning. When it was removed from their persons by others who came to their assistance defendant in error was apparently not seriously injured but he had suffered a bruise thereby on the top of his head. He was afterwards on three occasions adjudged insane, the first time being about two and a half years after his injury, and at the time of the trial he had been home about two years, having been discharged from the hospital as incurable. The evidence for plaintiff in error tended to show that his injuries were not the cause of his insanity but that the form of his insanity was what is known as dementia præcox,—a form of insanity usually caused by toxemia or poisoning of the system, and is described by some of the experts as a disease known as precocious dementia, which the plaintiff in error's expert witnesses testified was never caused by traumatism. The expert testimony of defendant in error was to the effect that traumatism sometimes produces dementia præcox; that blows on the head often produce insanity, and that defendant in error's insanity was caused by his injuries aforesaid. As the evidence of defendant in error fairly tended to show that his insanity was a result of his injuries, whether or not his insanity resulted from such injuries was a question of fact for the jury to finally determine on proper instructions and not a question

of law, and this court is therefore concluded by the judgments and findings of the superior and Appellate Courts.

The first contention of plaintiff in error is that the declaration does not state a cause of action, and that the Appellate and superior courts both erred in holding that it does and in overruling plaintiff in error's motion in arrest of judgment. There is no complaint that the declaration is informal. It is the contention of plaintiff in error that the failure of plaintiff in error to remove from over the public street and sidewalk the defective and dangerous awning attached to private property and not resting on or attached to the street relates to the failure of the city to perform acts which it is empowered to do as a governing agency and in the discharge of duties imposed for the public or general welfare, and that the maxim *respondeat superior* does not apply to a failure on the part of the city to perform such acts. This contention cannot be sustained. The city councils in cities have the following powers and duties: To lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, sidewalks and public grounds and to regulate the use of the same; to prevent and remove encroachments and obstructions upon the same; to regulate the use of sidewalks and all structures thereunder and to require the owner or occupant of any premises to keep the sidewalk in front of or along the same free from snow and other obstructions; to regulate and prevent the use of streets, sidewalks and public grounds for signs, sign posts, awnings, awning posts, telegraph posts, posting hand-bills and advertisements. (Jones & Addington's Ann. Stat. sec. 34, pars. 7, 9, 10, 14, 17.) A city is not liable for the negligent acts of its officers or employees who are acting under the police power granted to the city or who are endeavoring to carry out the regulations of the city for the public health and the care of the sick and destitute. The city is not liable for its officers' negligence while they are exercising judicial, discretionary or legislative au-

thority conferred by its charter or while discharging their duties imposed solely for the benefit of the public. Where a municipal corporation is acting, within its authority, in a ministerial capacity in the management of its property or in the discharge of its duties in repairing or removing obstructions from streets, or is negligent in failing to discharge its duties of keeping its streets in repair and in safe condition for travel, it is liable for all injuries caused by such negligence when the party injured is exercising due care for his safety. *Johnston v. City of Chicago*, 258 Ill. 494.

A municipal corporation acts judicially when it selects and adopts a plan for the construction of a public improvement, but in carrying out such plan or in removing obstructions or dangers from its streets it acts ministerially and is bound to see that the work is done in a reasonably safe and skillful manner. (*City of Chicago v. Seben*, 165 Ill. 371.) The omission of such municipality to discharge the duty of repairing its streets and freeing the same from dangers renders it liable to one injured by reason of such omission and failure, when such person is exercising due care. The positive duties of incorporated cities in this State require them to keep their streets reasonably safe for pedestrians traveling the same and who use reasonable care in so doing. (*People v. Willison*, 237 Ill. 584; *Village of Palestine v. Siler*, 225 id. 630.) The cities in Illinois hold their streets and alleys in trust for the public use, and they have no power to alien or otherwise incumber their streets and alleys by permitting the construction of permanent awnings or balconies over the same. (*Hibbard & Co. v. City of Chicago*, 173 Ill. 91; *McCormick v. South Park Comrs.* 150 id. 516.) The weight of authority in this country is, that where the duty of keeping the streets in reasonably safe condition for travel by pedestrians using due care is vested in incorporated villages and cities, such duty requires such municipalities to remove all obstructions and dangers below, on and above the surface of the streets that are dangerous to travelers

thereon, and that such obstructions include dangerous awnings and other overhead structures or fixtures. For failure to exercise due care in discovering and removing the same such municipalities are liable for personal injuries occasioned thereby. (*Day v. Inhabitants of Milford*, 5 Allen, 98; *Grove v. City of Fort Wayne*, 45 Ind. 429; *Bohen v. City of Waseca*, 50 Am. Rep. 564; *Byne v. City of Americus*, 6 Ga. App. 48; *Larson v. City of Grand Forks*, 3 Dak. 307; *City of Purcell v. Stubblefield*, 41 Okla. 562; *Wheeler v. City of Fort Dodge*, 131 Iowa, 566; *Cason v. City of Ottumwa*, 102 id. 99.) The declaration stated a cause of action and the court ruled properly in so holding.

There was no dispute in this case as to the manner or cause of defendant in error's injuries. It is wholly undisputed that defendant in error received a bruise or wound on his head by reason of the falling of the defective awning. When there is no dispute as to the manner or cause of the injury and no dispute that there was an injury sustained by reason of the acts of which complaint is made, a physician may then testify that a later malady was or was not caused by the accident or the original injury without invading the province of the jury. (*City of Chicago v. Didier*, 227 Ill. 571; *Fellows-Kimbrough v. Chicago City Railway Co.* 272 id. 71; *Heineke v. Chicago Railways Co.* 279 id. 210.) It was not error for the court to permit defendant in error's expert witness to testify that his insanity resulted from the injuries received on his head.

The only other error alleged by plaintiff in error is that the record fails to show that the insanity of the defendant in error resulted from the injuries of which complaint was made. As is already indicated and held, this question was one of fact which is settled by the verdict of the jury and the judgment and finding of the Appellate Court.

The judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.

(No. 12816.—Reversed and remanded.)

THE CITY OF JOHNSTON CITY, Appellee, *vs.* THE CHICAGO
AND EASTERN ILLINOIS RAILROAD COMPANY, Appellant.

Opinion filed October 27, 1919.

1. SPECIAL ASSESSMENTS—*when, only, can railroad right of way be assessed for paving street.* As the limit of a special assessment for benefits resulting from paving a street is the enhanced value of the property assessed, if the use of railroad property is restricted to the running of trains there can be no assessment unless the value is increased for that use.

2. SAME—*property devoted to restricted use must be benefited for that use.* Where property is restricted by statute or grant to a particular use and is at the time of the improvement devoted to such use, the true measure of the benefit which the improvement will confer is the increased value for the restricted use, in the absence of proof reasonably tending to show that the property, under present conditions, is about to be devoted to other uses.

3. SAME—*increase in freight traffic cannot be considered in assessing benefits to right of way of railroad.* An increase in freight traffic and the general business of a railroad company cannot be considered in assessing benefits to its right of way from the paving of a street.

4. SAME—*property assessed need not abut upon the improvement.* In assessing property for the paving of a street it is not necessary that the property assessed shall abut upon the improvement; nor is a special assessment made upon the number of square feet in the property or upon the feet of frontage, but it is made upon a basis of benefits.

APPEAL from the County Court of Williamson county;
the Hon. W. F. SLATER, Judge, presiding.

H. T. DICK, and E. M. SPILLER, for appellant.

HOSEA V. FERRELL, for appellee.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

This appeal is prosecuted to review a judgment of the county court of Williamson county overruling objections of the Chicago and Eastern Illinois Railroad Company to a

special assessment levied by the city of Johnston City upon the depot grounds and a portion of the right of way of the company to pay the cost of paving Broadway, a public street crossing the property of appellant at right angles, in the center of the business district of Johnston City, Illinois.

About 1894 the Chicago, Paducah and Memphis Railroad Company acquired a right of way 90 feet in width, and constructed thereon a railroad passing north and south through the territory that has since become Johnston City. Along the west side of its right of way, at a point 116 feet south of what is now Broadway in Johnston City, the company located its station. Shortly after this there was laid out on the east side of the right of way the original survey of Johnston City. The principal street then established in Johnston City was Broadway, running east and west through the city. It was laid out 60 feet in width and on each side blocks were divided into lots. Along the east side of appellant's right of way were fractional blocks, called "out-lots 1, 2, 3 and 4." Out-lot 1 is the farthest north and is separated from out-lot 2 by Lake View alley. Out-lot 2 is immediately north of Broadway and out-lot 3 immediately south of Broadway. Further south is out-lot 4, separated from out-lot 3 by Sunflower alley. Extending along the east line of these four out-lots, and parallel with the right of way, is Main street of Johnston City, being 60 feet wide. February 20, 1897, appellant purchased this right of way from the Chicago, Paducah and Memphis Railroad Company, and August 4, 1897, it purchased from the owners out-lots 1, 2, 3 and 4. Shortly thereafter it built its present depot, which is located on out-lot 4. In 1901 another addition was added to Johnston City, and lots and blocks were laid out on the west side of the right of way. Broadway was extended 60 feet wide across the appellant's right of way. Along the west line of appellant's right of way is Water street. For a block north of Broadway and half a block south of Broadway the west 20 feet of the

original right of way is now the east 20 feet of Water street. At Sunflower alley Water street jogs west and appellant's right of way at this point is made 70 feet wider. Appellant's right of way north of Broadway is now 111 feet wide,—67 feet from the center of the track to the west line of Main street and 44 feet from the center of the track to the east line of Water street. There are no buildings on that part of the right of way in the block north of Broadway. South of Broadway the right of way is the same width for half a block and then 70 feet are added on the west at a point opposite the station located on out-lot 4. In this space west of the main line is an industrial siding and also some coal sheds and grain houses. These sheds and houses are on Water street, in the widened portion of appellant's right of way, and the north building is 116 feet south of the south line of Broadway. The sheds and houses are owned by private concerns, to whom the land is leased by appellant. Out-lot 3 is vacant and is used only by teamsters, transfer men and patrons of appellant.

The assessment roll was filed March 20, 1918, and the property of appellant was described as follows: "All that portion of the right of way, way lands and depot grounds of the Chicago and Eastern Illinois Railroad Company that is located and situated in the city of Johnston City, Illinois, and that lies between the westerly prolongation of the south line of Grant street and the westerly prolongation of the south line of Lincoln street, in said city of Johnston City, Illinois." Said property was assessed \$1832.14. April 6, 1918, the appellant filed objections as follows:

1. "Your objector objects to the confirmation of said assessment by this honorable court as to all of the property belonging to the objector included in said assessment lying north of Broadway street, in the said city of Johnston City, Illinois, because said property is used exclusively for the running of trains by this objector and for no other uses or purposes, and is therefore not benefited by said pro-

posed pavement along said Broadway avenue or street, and therefore any assessment against it would be null and void.

2. "This objector objects to the confirmation of said assessment covering that part of its property lying on the west side of its main track, in the said city of Johnston City, Illinois, south of said Broadway avenue or street, for the reason that said property is used by the objector exclusively for the running of trains and for no other purposes, and is therefore not benefited by said proposed pavement along and over said Broadway street or avenue, and any assessment against it would therefore be null and void.

3. "This objector objects to the confirmation of said assessment because the same is unfair and unjust and discriminatory against this objector and its property and not equitably assessed with the property of other individuals lying adjacent to the said Broadway avenue in this: That said proposed assessment includes all of the property of this objector lying between Broadway and Grant street, in said city of Johnston City, on the north side of said Broadway avenue or street, and all of this objector's property between Broadway and Lincoln street on the south side of Broadway avenue or street, in the said city of Johnston City, whereas said assessment only assesses the property of other property owners fronting on Broadway back to the first alley to the north of Broadway street and the first alley south of Broadway street, and said assessment is therefore unjust, inequitable and discriminatory against the property and the rights of this objector.

4. "This objector objects to the confirmation of said assessment against its property herein described for the reasons herein stated, and respectfully asks that said assessment roll as to this objector's property be not confirmed or allowed by this honorable court, the said assessment proposed to be assessed against your objector being the sum of \$1832.14, as shown by the assessment roll filed herein."

There are unusual conditions under which a railroad right of way can be said to be benefited by a local improvement, but as a general rule it cannot be. (*City of Highland v. Chicago and Northwestern Railway Co.* 276 Ill. 98.) The limit of an assessment for benefits resulting from paving a street is the enhanced value of the property, and where its use is restricted to the running of trains there can be no assessment unless the value is increased for that use. (*City of Chicago v. Chicago and Northwestern Railway Co.* 278 Ill. 86.) Where the property is restricted by statute or grant to a particular use and cannot be legally applied to any other use and is at the time of the improvement devoted to such particular use, the true measure of the benefit which the improvement will confer is the increased value for the restricted use, in the absence of proof reasonably tending to show that the property in question, having regard to present conditions and the existing business and wants of the public, is about to be devoted to other uses. (*City of Lincoln v. Chicago and Alton Railroad Co.* 262 Ill. 11.) In this State, however, it is a settled rule that the property of a railroad corporation, even though used for railroad purposes, if benefited, may be assessed for a local improvement. (*City of Kankakee v. Illinois Central Railroad Co.* 257 Ill. 298.) But an increase in freight traffic and the general business of appellant cannot be considered in assessing benefits to its right of way. *City of Kankakee v. Illinois Central Railroad Co.* 264 Ill. 69.

On the hearing on the objections filed, appellee introduced evidence showing the increased value of out-lots 1, 2 and 3 as commercial propositions. There is nothing in the record to justify the claim that the railroad company is holding these lots for purely commercial purposes. The right of way on either side of Broadway, including out-lots 1, 2 and 3, is only 111 feet wide, which is certainly none too wide for railroad purposes within a city. Such evidence clearly had nothing to do with determining the legal

question as to whether or not this tract of land was at all subject to special assessment, and the court erred in admitting it.

At the time appellee sought to subject appellant's property north of Broadway to this assessment, and for a long time prior thereto, that part of its right of way had been used exclusively in the operation of its train service and for no other purpose. There is nothing showing that this property will ever be used for any other purpose than the operation of trains, and it is not disclosed how it can be made more valuable for that purpose by this improvement. Therefore it is inconceivable how this contemplated improvement will benefit that particular portion of appellant's right of way, and the court erred in overruling appellant's objection No. 1.

A part of the property south of Broadway and west of appellant's main line was leased by appellant to certain private individuals and will probably be benefited some by the improvement of Broadway. The benefit will necessarily be considerably lessened by the fact that this leased property is 116 feet off Broadway. That part of the right of way south of Broadway and east of the main line,—out-lots 3 and 4,—must all be considered station grounds. No other use has ever been made of out-lot 3, which lies between the station and Broadway, except as a means of access to the station proper and to appellant's right of way by teamster's and other patrons of appellant. This property will necessarily be benefited by the improvement. Appellant's objection No. 2 was therefore properly overruled.

There was no error in overruling appellant's objection No. 3, because it is not necessary that the property assessed should abut upon the improvement, nor is a special assessment made upon the number of square feet in the property or upon the feet of frontage, but it is made upon a basis of benefits. *City of East St. Louis v. Vogel*, 276 Ill. 490.

For the errors hereinbefore pointed out it will be necessary to reverse the judgment. The judgment of the county court of Williamson county is therefore reversed and the cause remanded to that court, with directions to hear evidence in accordance with the views herein expressed, to determine the benefits accruing to that portion of appellant's right of way in the block south of Broadway.

Reversed and remanded, with directions.

(No. 12333.—Reversed and remanded.)

BLANCHARD BRO. & LANE, Appellant, vs. THE S. G. GAY COMPANY *et al.* Appellees.

Opinion filed October 27, 1919.

1. CORPORATIONS—*when appointment of a receiver may be attacked collaterally.* Where a court has jurisdiction both of the subject matter and the necessary parties its appointment of a receiver of a corporation cannot be assailed in a collateral proceeding however erroneous it may be, but where the court has no jurisdiction to entertain the bill and appoint the receiver with the powers given, the decree is void and is open to collateral attack.

2. SAME—*courts of chancery have only statutory power to appoint receivers.* Courts of chancery can appoint receivers of corporations only when expressly authorized by statute, and they have no general power to make such appointments.

3. SAME—*courts are not inclined to appoint receiver merely to preserve assets, on application of stockholders.* Courts are particularly disinclined to appoint a receiver for misconduct or mismanagement of a corporation, or for the purpose of merely preserving its assets, where the application is made by stockholders.

4. SAME—*stockholder cannot secure appointment of receiver to defeat action by the creditors.* While a stockholder may invoke the power of a court of equity to appoint a receiver where the corporation is fraudulently mismanaged by its officers, the stockholder cannot invoke the jurisdiction of the court to take charge of all the company assets by a receiver and thus defeat action by the creditors under section 25 of the Corporation act. (*People v. Weigley*, 155 Ill. 491, followed.)

5. SAME—*appointment of receiver to distribute assets is equal to dissolution of corporation.* Appointing a receiver to take possession of the assets of a corporation and to distribute them is tantamount to dissolving the corporation by decree in equity.

6. SAME—*when rule of caveat emptor applies to sale by receiver.* Where the court has no jurisdiction to appoint a receiver of the assets of a corporation the receiver acquires and can convey no title to any of the property, and in any judicial sale by the receiver the rule of *caveat emptor* applies.

7. SAME—*when defense that a creditor is estopped to question sale by receiver cannot be set up by demurrer.* In an action by a creditor under section 25 of the Corporation act, attacking the appointment of a receiver and a sale of assets by him, the defense that the creditor is estopped by having accepted its share of the proceeds of the sale cannot be set up by demurrer but must be made by plea or answer, where the creditor's bill merely alleges that a certain per cent of its claim has been paid and does not disclose by whom or in what manner it was paid.

APPEAL from the Circuit Court of LaSalle county; the Hon. EDGAR ELDREDGE, Judge, presiding.

GROSSBERG & HAFFENBERG, and L. W. BREWER, for appellant.

DUNCAN & O'CONOR, RECTOR C. HITT, and McDougall & CHAPMAN, for appellees.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

Appellant, a corporation, on behalf of itself and all other creditors of the S. G. Gay Company, filed a bill in chancery in the circuit court of LaSalle county May 9, 1918, under section 25 of the Corporation act, praying for the appointment of a receiver for the Gay Company, an accounting against the several parties defendant, the dissolution of the corporation and the fixing of stockholders' liability. The Ottawa Banking and Trust Company answered the bill. The First National Bank of Ottawa, the First Trust Company of Ottawa, and Fred A. Hatheway and Charles C. Wilcox, jointly, filed a demurrer to the bill. The

National City Bank of Ottawa, Al F. Schoch, G. Barnard, K. Schmid, Simeon G. Gay and Albert C. Bradish also filed separate demurrers. All the demurrers were sustained and the bill was dismissed for want of equity. Appellant elected to stand by its bill and has prosecuted this appeal.

The bill of complaint alleged, in substance, the following facts: The S. G. Gay Company was organized as an Illinois corporation, with a capital stock of \$200,000. Its principal place of business was in the city of Ottawa. Its object was the manufacture of carriages, buggies, vehicles, automobiles, auto trucks and motor wheels. It began doing business about November 8, 1913, and continued until September 11, 1915, when it ceased and has done no business since. When it ceased doing business it owed debts to the amount of \$74,123.60, about twenty-five per cent of which has since been paid, leaving a balance of its debts of \$55,550.45 and interest thereon, of which the sum of \$3043.04 and interest is due appellant, less \$752.60 which has been paid. The par value of the shares of stock was fixed at \$100 per share. At the organization of the company L. W. Nichols and C. T. Bangs subscribed for five shares of stock each, K. Schmid and G. Barnard one share each and Simeon G. Gay 1988 shares. When the company ceased doing business Simeon G. Gay was the holder of 1160 shares, Albert C. Bradish, L. W. Nichols, C. T. Bangs and G. Barnard were each the holder of five shares and K. Schmid of one share. Gay has not fully paid for his stock but is still indebted upon his subscription in the sum of \$80,700.

It is further alleged in the bill that on September 11, 1915, Simeon G. Gay, as a stockholder of said company, filed a bill in said circuit court against the S. G. Gay Company alone, praying that a receiver may be appointed to take charge of the books, property and assets, of every kind, of the company, and apply the same, under the direction of the court, to the liquidation of its debts; that he

may be authorized, until the further order of the court, to continue the business of the company, with all other powers usually applicable to and exercised by receivers, and for other and further relief. A copy of the bill of Gay is filed with and as part of the original bill in this case. That bill alleged the due incorporation of said company with a capital stock of \$200,000, and stated its objects and place of business and that all of its stock had been fully paid for; that the complainant was the owner of 1160 shares of such stock, of the par value of \$116 each, and that Bert Bradish, L. W. Nichols, C. T. Bangs and G. Barnard each owned five shares, K. Schmid one share, and that the company owned the remaining shares. The bill stated the property of the company, consisting of real estate, buildings, improvements, engines, boilers, machinery and fixtures, was of the value of more than \$90,000; that for the purpose of furnishing funds to carry on and conduct its business it became and is indebted to the First National Bank of Ottawa, the National City Bank of Ottawa and the Ottawa Banking and Trust Company of Ottawa in large sums of money, and for the purpose of purchasing material it also became indebted to manufacturers in large sums of money; that the total amount of its indebtedness for such purposes is \$74,123.60; that there is contained in its manufacturing building a large amount of raw material of the value of \$67,381.03, some of which is in a state of partial completion and some in a raw state; that the total value of the assets of the company is \$154,271.63; that if its stock were sold in its present state it would result in great loss and damage to its creditors and stockholders; that the actual amount of cash owned by it is about \$25, and that it is impossible for the company to borrow money with which to complete the manufacture and marketing of raw material; that if a receiver be appointed to take care of the business of the company, to complete and market the partially manufactured material and to sell or manufacture the

raw material, the loss and damage to the creditors and stockholders would in a large measure be prevented and its assets conserved; that it is impossible for the company to obtain any further funds for the continuance of its business and the payment of the wage earners; that some of the indebtedness is represented by judgment notes, and complainant fears that unless a receiver be appointed as prayed, judgments may be entered upon the same and the assets of the company sacrificed.

It is further alleged in the original bill that Fred Hatheway, receiver under the former bill, has taken possession of all the assets of the company aforesaid; that on April 29, 1916, the First Trust Company of Ottawa and Albert F. Schoch, *alias* Al F. Schoch, through color of conveyance by Hatheway as pretended receiver, obtained possession of all said property, real and personal, for a pretended consideration of \$10,000; that in so purchasing and possessing said property Schoch and said trust company acted for divers parties, the National City Bank of Ottawa, the First National Bank of Ottawa and the Ottawa Banking and Trust Company; that Schoch was at such time, and is now, vice-president and director of the National City Bank; that afterwards, by pretended deed of September 1, 1917, the First Trust Company pretended to convey to Charles C. Wilcox, trustee, the plant and lot of said company, which deed is recorded; that the Ghent Motor Car Company and the Victor Motor Car Company, corporations, obtained possession of said real estate, machinery, plant and equipment by deed, lease, bill of sale or contract from Schoch and the First Trust Company; that all of said real estate, machinery, equipment and buildings are substantially in the same form and character as they existed September 11, 1915, when the company ceased business, and are still in the hands and possession of the Victor Motor Car Company and are of substantially the same value; that on September 9, 1915, a number of the creditors of the company, among whom

were the representative of appellant and officers and other duly authorized agents of said several banks, met for the purpose of advising and conferring with one another upon their course of action toward the company for the liquidation and payment of its debts; that in said meeting it was agreed among all said creditors that in consideration of mutual forbearance upon the part of each of them in refraining from securing a preference or advantage over the remaining creditors said banks should be, and then were, entrusted and empowered to bring and have charge of all proceedings that might be found necessary against the company, and that all proceedings whatever should be for the benefit of all alike and *pro rata*; that said banks wrongfully and fraudulently, and in disregard of their agreement, caused judgments to be entered by confession against the company in said court for the First National Bank in the sum of \$15,565.59 and for the National City Bank for \$18,960.66, which latter judgment was also against Simeon G. Gay, and execution issued thereon and was returned "no property found;" that plaintiff therein subsequently entered satisfaction in full thereof as to Gay, and it is averred that the satisfaction of the judgment as to Gay constituted a satisfaction as to the defendant corporation and that said judgment is no lien, but that if the same be held a lien, plaintiff should only recover thereon its *pro rata* share with the other creditors having no judgments. It is further averred that all the acts of Hatheway as pretended receiver, and all orders in said cause, should be held null and void, and that they conferred no right or title on the receiver in any of the property of the company and did not authorize him in any manner to sell or dispose of the same and pass title thereto; that the Ghent Motor Car Company and the Victor Motor Car Company obtained no title or interest in said property against the creditors; that Hatheway, Schoch, the Ghent Motor Car Company, the National City Bank, the First National Bank, the Ottawa Banking and Trust Com-

pany, the First Trust Company, Charles C. Wilcox, trustee, and Simeon G. Gay, should each and all of them, by reason of said facts, be held liable for the debts of the company, and should be required to fully account for any of the property or assets of the company which passed into their hands, and that each and all of them, after receiving credit for such amount or amounts as they may be equitably entitled to, should be adjudged and decreed to be so liable and to pay the remainder of such debts to the receiver, after exhausting the assets of the company.

Omitting the allegations concerning the former bill filed by Hatheway, the receiver, the bill stated a good cause of action under section 25 of the Corporation act. That section provides: "If any corporation or its authorized agents shall do, or refrain from doing any act which shall subject it to a forfeiture of its charter or corporate powers, or shall allow any execution or decree of any court of record, for a payment of money, after demand made by the officer, to be returned 'No property found,' or to remain unsatisfied for not less than ten days after such demand, or shall dissolve or cease doing business, leaving debts unpaid, suits in equity may be brought against all persons who were stockholders at the time, or liable in any way, for the debts of the corporation, by joining the corporation in such suit; and each stockholder may be required to pay his *pro rata* share of such debts or liabilities to the extent of the unpaid portion of his stock, after exhausting the assets of such corporation. And if any stockholder shall not have property enough to satisfy his portion of such debts or liabilities, then the amount shall be divided equally among all the remaining solvent stockholders. And courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, to appoint a receiver therefor who shall have authority * * * to sue in all courts and do all things necessary to closing up its affairs, as commanded by the decree of such court."

The defendant corporation and all other parties mentioned in the bill are made parties defendant to the bill.

The appellant's contention is that in the proceeding of Simeon G. Gay against the S. G. Gay Company for the appointment of a receiver, etc., the court was without jurisdiction of the subject matter, and that, therefore, all the acts of the receiver are a nullity. Appellees' contention is that the circuit court had power to appoint a receiver under the bill of Simeon G. Gay and that the proceedings in that case constitute a bar to the present proceedings, which are, in effect, a collateral attack upon the prior proceedings. It is admitted by appellees in their argument that if the appointment of Hatheway as receiver was a nullity he acquired no title to any of the property and so could convey none.

It is true that where a court has jurisdiction both of the subject matter and the necessary parties its appointment of a receiver cannot be assailed in a collateral proceeding, however erroneous it may be. (*Richards v. People*, 81 Ill. 551.) Courts of chancery have no general power to appoint receivers of corporations, and the general rule is that they can only appoint receivers where expressly authorized by the statute. (*Coquard v. National Linseed Oil Co.* 171 Ill. 480.) Courts are particularly disinclined to appoint a receiver for misconduct or mismanagement of a corporation or for the purpose of merely preserving its assets where the application is made by stockholders, for the reason that the sovereign does not furnish public agencies for the carrying on of private enterprises. (5 Thompson on Corporations, sec. 6347; 34 Cyc. 84, par. c.) There are exceptions to this general rule. A stockholder may invoke and set in motion the powers of a court of equity to appoint a receiver where the corporation is fraudulently mismanaged by the officers, whereby it is in imminent danger of insolvency or has been rendered insolvent by reason of such mismanagement. (34 Cyc. 86.) It has been expressly held by this court in *People v. Weigley*, 155 Ill. 491, that a stockholder

may not invoke the jurisdiction of a court of equity to take charge of all the company assets by a receiver, and thus defeat the action of the creditors, under said section 25. Appointing a receiver to take possession of the assets of a corporation and to distribute them is tantamount to dissolving the corporation by decree in equity. When the property of a corporation is all sold and distributed and its officers are powerless to raise further means to carry on its business the corporation is powerless to exercise its corporate franchise. It is then for all practical purposes dissolved.

The former bill appointing Hatheway receiver did not even allege insolvency. There are no allegations in the bill tending to show that the corporate property would be wasted, destroyed, injured or removed by its officers or other persons or that the officers were guilty of any fraud or misconduct of any kind that in anywise endangered the corporate property. The only complaint is that the corporation, which is alleged or shown to be solvent, will be endangered by creditors who might obtain judgments on their just demands and undertake to enforce the collection of the same by levy and sale. It alleges that the corporation officers are powerless to borrow money or obtain money or prevent such threatened danger, but there is no showing in the bill how or in what manner a receiver of the court could do more in that direction than the officers had done or could do. The proceedings of the court under the receiver tend to show that no thought or attempt was made by the receiver to borrow money or to further conduct the business. It has been simply a proceeding to dispose of the property and pay its debts without actually dissolving the corporation. The whole proceeding operated as a hindrance to creditors operating under section 25 of the Corporation act. The court clearly had no jurisdiction by reason of the allegations of the bill, all of which are above set forth, to appoint a receiver to take charge of and distribute the assets. To entertain such a bill as against creditors would

absolutely bar them of their remedy, under section 25 of the Corporation act, that is given them expressly by the statute in case a stockholder should bring a bill of that character before the creditor could file his bill.

The court having no jurisdiction to entertain the bill and to appoint a receiver with the powers aforesaid, the decree was void and the receiver acquired no title to any of the property and therefore could convey no title. (*Fitch v. Wetherbee*, 110 Ill. 475.) The decree being absolutely void was open to collateral attack. (*People v. Weigley*, *supra*.) In any judicial sale by the receiver the rule of *caveat emptor* must be applied. *Hutson v. Wood*, 263 Ill. 376; *Manternach v. Studdt*, 240 id. 464.

Appellees further insist that according to the allegations of the bill appellant has received about one-fourth of its claim from the proceeds of a judicial sale of the property by the receiver, and that having accepted its full proportion from the receiver on the distribution of such proceeds, and having full knowledge, at the time, of the sale of the assets of the corporation and of the order of the court, it is now estopped to question the sale so made, and they rely on the case of *Marshal v. McDermitt*, L. R. A. (1907C) 888, as authority for their position. The facts disclosed by appellant's bill do not show that appellant received payment on its claim in the manner aforesaid. The allegations of the bill are, simply, in that regard, that about twenty-five per cent of its claim had been paid, and by whom or in what manner it was paid is not disclosed. Such a defense, therefore, cannot be made by demurrer, but if such defense exists it should be made by plea or answer and not by demurrer.

The court erred in sustaining the demurrers and dismissing the bill for want of equity, and for the reasons above given the decree of the circuit court is reversed and the cause remanded for further proceedings.

Reversed and remanded.

(No. 12795.—Judgment reversed.)

THE CONSUMERS MUTUAL OIL PRODUCING COMPANY,
Plaintiff in Error, *vs.* THE INDUSTRIAL COMMISSION
et al.—(CHARLES HOTALING, Defendant in Error.)

Opinion filed October 27, 1919.

1. WORKMEN'S COMPENSATION—*burden is on employer to prove employment was casual.* The burden of proof is upon the claimant to prove the employment and the injury, but the burden rests upon the employer to prove that the employment was but casual.

2. SAME—*definition of the word "casual."* The word "casual" means that which comes without regularity and is occasional or incidental.

3. SAME—*regularly recurring employment is not casual.* Where one is employed to do a particular kind of work, which employment recurs with regularity, and where it is probable that such recurrence will continue for a reasonable period of time, such employment is not casual.

4. SAME—*when employment is casual.* Where a laborer is hired to do a particular piece of work connected with the operation of an oil well, with the understanding that the work will require but a few weeks, the employment is casual.

WRIT OF ERROR to the Circuit Court of Lawrence county; the Hon. J. C. EAGLETON, Judge, presiding.

MCGAUGHEY, TOHILL & MCGAUGHEY, for plaintiff in error.

GEORGE W. LACKEY, for defendant in error.

Mr. JUSTICE STONE delivered the opinion of the court:

The circuit court of Lawrence county affirmed an award of the Industrial Commission in favor of the defendant in error, Charles Hotaling, for injuries received by him while in the employment of the plaintiff in error.

It appears from the record that the defendant in error was working for the plaintiff in error on what is known as an oil lease near the city of Lawrenceville, Illinois; that the accident happened on May 9, 1916, while the defendant

in error was assisting in the repair of a pump-jack used in the pumping of crude oil by the plaintiff in error; that he began work for the plaintiff in error on the 8th day of May, 1916, and was injured while engaged in the business for which he was employed by the plaintiff in error; that he had not been employed by the plaintiff in error prior to the 8th day of May, 1916, since October 9, 1914. Defendant in error was employed by F. J. Smith, the manager of said lease. Smith employed help only when he was unable to perform the services and do the work necessary in the proper management of the lease. The wages paid for the work performed by defendant in error in that vicinity were at the rate of \$70 per month. The testimony of defendant in error shows that Smith told him that there probably would be three or four weeks' work and may be longer than that; that at the time of the employment nothing was said as to the amount of wages to be paid; that he was paid for the work he performed on the basis and at the rate of \$70 per month; that there was no definite time fixed for the employment, other than the statement by Smith that it would be three or four weeks and may be longer. The record shows that at the time of the accident the defendant in error was repairing a jack, and while driving some nails with a hammer a portion of the nail struck him in the eye, causing total loss; that this repair work was necessary in order to carry on the usual business of producing oil. The record also shows that Smith looked after the work and was able to take care of it alone, except when certain machinery and pumps were out of repair and it was necessary to pull the wells, and then he hired extra help as needed and for no definite length of time.

The only question presented by the record is whether or not the employment of defendant in error was at the time of the injury casual. The burden of proof is upon the claimant to prove employment and injury, but the burden rests upon the plaintiff in error to prove that the employ-

ment was but casual. (*Chicago Great Western Railroad Co. v. Industrial Com.* 284 Ill. 573; *Peoria Terminal Co. v. Industrial Board*, 279 id. 352; *Victor Chemical Works v. Industrial Board*, 274 id. 11.) The defendant in error worked for different concerns engaged in pumping oil. He had worked for the plaintiff in error during the autumn of 1914. He was employed to assist in pulling certain wells and repairing certain pump-jacks. Smith testified that the work Hotaling was engaged to do required three or four days, and that he told Hotaling that such time would be required. It is evident from all the testimony in this record that neither party contemplated that the employment was to extend beyond the particular work of pulling certain pumps and repairing certain pump-jacks. The record shows that the wage paid for such services in that vicinity was at the rate of \$70 per month, whether the employment required one day or a month. Hotaling testified that nothing was said about what the wages would be, and it is not contended that he was employed to work for a month.

The usual and ordinary definition of the word "casual" as given by standard lexicographers is, that which comes without regularity and is occasional and incidental, as contrary to the significance of its antonyms, which are, "regular," "systematic," "periodic" and "certain." As was held in *American Steel Foundries v. Industrial Board*, 284 Ill. 99, the mere fact that the employment is for one job, only, does not necessarily make the employment casual if the employment be for an indefinite length of time. So where a woman was employed to do a particular work on Friday of each week her employment was held to be not casual. (*Dewhurst v. Mather*, 1 B. W. C. C. 328.) In *Shaeffer v. DeGrotola*, 85 N. J. L. 444, a workman was employed to shave skins at so much per dozen, and it was held that as the contract of employment showed an intention to give employment in the employer's business without limit as to time, the employment was not casual. In *Sabella v. Brazeleirs*,

6 Neg. & Comp. Cas. Ann. (N. J.) 958, the injured employee was a longshoreman who had frequently been employed by respondent to load and unload ships. He was injured while loading a ship. That class of work was not constant, depending upon whether there was a ship in port, but the employee was one of a class of stevedores and had been frequently called upon by the employer and had reasonable expectation of the regular recurrence of such employment in the future. The employment in that case was held to be not casual.

While each case must be largely decided upon its own facts, we believe the legislature intended that where one is employed to do a particular kind of work, which employment recurs with regularity, and where there is a reasonable ground that such recurrence will continue for a reasonable period of time, such employment is not casual. On the other hand, where the employment for one job can not be characterized as permanent or periodically regular but occurs by chance, or with the intention and understanding on the part of both employer and employee that it shall not be continuous, it is casual. Applying this rule to the employment of defendant in error, we are of the opinion that such employment was casual. He had not been employed by the plaintiff in error for nearly two years. The work he was to assist in doing was a particular and certain piece of work, which both he and his employer knew would require but a short time. There was nothing in the contract of employment nor in the relations of these parties, then or prior to that time, shown by the evidence, which would indicate that such employment was to be either continuous or recurring.

The Industrial Commission erred in holding that recovery could be had under the Workmen's Compensation act, as also did the circuit court. The judgment of the circuit court is therefore reversed.

Judgment reversed.

(No. 12685.—Judgment affirmed.)

CLIFFORD A. RAINFORD, Defendant in Error, *vs.* THE CHICAGO CITY RAILWAY COMPANY, Plaintiff in Error.

Opinion filed October 27, 1919.

1. MASTER AND SERVANT—*what necessary to deprive employer of defense of contributory negligence of an employee.* To deprive an employer of the full defense of contributory negligence of his employee on the ground that the employer had elected not to come under the Workmen's Compensation act the injury must be one arising out of and in the course of the employment; and this question is raised by a motion, at the close of the evidence, to direct a verdict of not guilty.

2. SAME—*when an accident arises out of employment.* To arise out of the employment the accident must be incidental to performing the contract of service, and the origin or cause of the accident must belong to and be connected with the contract of service.

3. SAME—*when an accident occurs in the course of employment.* An injury is suffered in the course of the employment where the accident occurs in the doing of something which the employee may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing.

4. SAME—*act of procuring lunch is incidental to employment.* The act of procuring lunch is reasonably incidental to the performance of the work of an employee, and an injury to an employee while on his way to order a lunch prepared at the proper time, and which occurs while he is still on the premises of the employer, arises out of and in the course of the employment.

WRIT OF ERROR to the First Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

HARRY P. WEBER, GEORGE W. MILLER, and ARTHUR J. DONOVAN, (JOHN R. GUILLIAMS, and FRANKLIN B. HUSSEY, of counsel,) for plaintiff in error.

JAMES C. McSHANE, for defendant in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

A petition for a writ of *certiorari* was allowed for a review of the judgment of the Appellate Court for the First District affirming a judgment of the superior court of Cook county in favor of Clifford A. Rainford, defendant in error, against the Chicago City Railway Company, plaintiff in error, for \$4500 damages and costs on account of a personal injury sustained by being struck by a south-bound street car on State street, between Fifty-ninth and Sixtieth streets, in Chicago, on June 30, 1913.

The amended declaration contained two counts, but the court instructed the jury to disregard the first count and submitted the issues raised by the second count and pleas of the general issue and a denial of ownership and operation. The second count, as finally amended, alleged ownership and operation by the defendant of a double-track street railway on State street; that plaintiff was a conductor on one of its cars running north along the east track; that the car was stopped 200 feet south of Fifty-ninth street and permitted to stand temporarily at that place; that while so stopped and standing the defendant operated another car south on the west track; that plaintiff rightfully attempted to cross the west track, and the defendant ran the south-bound car past the first mentioned car at a high rate of speed without giving any sufficient warning and struck the plaintiff, causing an injury, and that the defendant had elected not to provide and pay compensation according to the provisions of the Workmen's Compensation act of 1911.

There was no evidence of the alleged high rate of speed, but, on the contrary, the car was running at a very moderate rate and stopped almost immediately after the accident. The only disputed fact was whether a warning was given of the approach of the south-bound car, four witnesses for the plaintiff testifying that they did not hear any

gong and six witnesses giving affirmative testimony that the gong was rung. Whether it was or not, probably no court or jury would acquit the plaintiff of contributory negligence, because he exercised no care whatever for his own safety and offered no excuse for a failure to see the approaching car, and his negligence would have barred any action on account of his injury except for the elimination of that defense by the Workmen's Compensation act, which provides that such negligence shall be considered by the jury in reducing the amount of damages. The serious question, therefore, is whether the accident came within the provisions of the Workmen's Compensation act. The petition for a writ of *certiorari* was upon the ground that it did not, and the argument on the hearing is to the same effect. The question was raised by a motion, at the conclusion of the evidence, for a directed verdict of not guilty, and the error assigned on the refusal of the motion is open as a question of law in this court.

The plaintiff was employed as an extra conductor for three months before the day of the accident and his previous runs had been on State street from Sixty-third street down-town, and there had always been a restaurant at the end of the line where he could get his lunch, and a period of fifteen or twenty minutes was allowed by the defendant for lunch at the end of the line between the second and third trips. The night before the accident he was assigned to the run on State street from Seventy-ninth street down-town. On that run he found that there was no restaurant at the end of the line, which was open prairie, and there was no place to obtain lunch there to be eaten during the lunch period. He lived at 5912 State street, on the west side of the street between Fifty-ninth and Sixtieth streets, just south of where the elevated railroad crossed State street. When the plaintiff became aware that there was no restaurant at the south end of his run he told his motorman to stop the car in front of his house so that he

could run over and order his lunch prepared for him in time to pick it up on his way back and take it to Seventy-ninth street, where he would eat it during the regular lunch period. When the car arrived in front of plaintiff's house the motorman stopped it and the plaintiff got off on the east side at the rear end and went round the rear of the car upon the west track, where he was struck by the south-bound car.

To bring an accident within the Workmen's Compensation act it must arise out of the employment. The origin or cause of the accident must belong to and be connected with the contract of service. To arise out of the employment the accident must be incidental to performing the contract of service. The accident must also be suffered in the course of the employment in the doing of something which the employee may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing. (*Dietzen Co. v. Industrial Board*, 279 Ill. 11; *Central Garage of LaSalle v. Industrial Com.* 286 id. 291.) The question presented to the superior court, therefore, on the motion to direct a verdict, was whether there was evidence fairly tending to prove that the stopping of the car and the act of plaintiff in arranging for his lunch were connected with his contract of service and incidental thereto, and if so, whether the act of the plaintiff was one which he might reasonably do at the place and under the existing circumstances. Such an act as procuring lunch is reasonably incidental to the performance of the work of an employee, being one of the necessities imposed by nature. That which is reasonably necessary to the health and comfort of the employee, although personal to him, is incidental to the employment and service. (*Boyle v. Columbia Fireproofing Co.* 182 Mass. 93; *In re Sundine*, 218 id. 1; *Milwaukee Western Fuel Co. v. Industrial Com.* 159 Wis. 635; *Archibald v. Ott*, 77 W. Va. 448.) The plaintiff was still on the tracks of

the defendant at the time of the accident, and it does not follow that there would have been a liability for an accident happening at a restaurant or at his home. The decision in *Nelson Railroad Construction Co. v. Industrial Com.* 286 Ill. 632, was on the ground that the injury occurred when McGhan was using a way which he had no right to use, in violation of his instructions, but in this case the injury was received as a natural incident of the employment. The court did not err in refusing to direct a verdict.

Objection is made to instruction No. 2 given at the instance of the plaintiff, which quoted section 1 of the Workmen's Compensation act and advised the jury that if the evidence showed it was reasonably necessary and incidental to the proper performance of plaintiff's duty as conductor that he should have his lunch at the time and place allowed for that purpose, and that it was reasonably necessary and proper for him to leave his car and cross the street to his home and make arrangement for procuring his lunch and was injured while so doing, he was acting within the scope of his employment and his injuries arose out of and in the course of his employment, within the meaning of the statute. It cannot be doubted that it was reasonably necessary and incidental to his employment that the plaintiff should have his lunch at the time and place allowed by the defendant for that purpose, and if it was reasonably necessary and proper for him to attempt to make the arrangement he did, then, as a matter of law, the injury did arise out of and in the course of his employment and the instruction was correct.

Objection is also made to instruction No. 5, which purported to give to the jury what elements were to be considered in estimating any damages allowed to the plaintiff, and it omitted the element of plaintiff's contributory negligence in reducing the amount of damages. As originally tendered by plaintiff it concluded with this statement: "You are further instructed that if you believe from the evidence

that the plaintiff was guilty of contributory negligence, such contributory negligence shall be considered by you in reducing the amount of damages, if any, to which plaintiff might otherwise be entitled." Defendant's counsel objected to this paragraph and it was struck out, so that no complaint can be made of the omission. While the omitted element was quite important, it was included in instructions Nos. 2 and 7.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(Nos. 12436-12437.—Judgment affirmed.)

ST. HEDWIG'S INDUSTRIAL SCHOOL FOR GIRLS, Appellee, *vs.*
THE COUNTY OF COOK, Appellant.—POLISH MANUAL
TRAINING SCHOOL FOR BOYS, Appellee, *vs.* THE COUNTY
OF COOK, Appellant.

Opinion filed October 27, 1919.

1. CONSTITUTIONAL LAW—*act requiring county to pay for maintenance of girls at industrial schools does not violate constitution.* Section 9 of the act requiring the county to pay \$15 a month for the care of dependent girls at industrial schools, (Hurd's Stat. 1917, p. 2705,) does not violate that section of the constitution prohibiting a donation of public funds to denominational institutions, although the schools to which the girls are sent are conducted by religious denominations, where said sum is less than the actual cost for the care of the girls at such institutions and at the State institutions. (*Dunn v. Chicago Industrial School*, 280 Ill. 613, followed.)

2. SAME—*act for care of girls at industrial schools does not impose a tax for local purpose.* Section 9 of the act requiring the county to pay for the care of dependent girls at industrial schools does not violate section 10 of article 9 of the constitution, providing that the General Assembly shall not impose taxes upon municipal corporations for corporate purposes, as such expense is not only for a local purpose but is also a means of discharging obligations resting upon the State.

3. SAME—*when General Assembly may impose tax on municipality.* Section 10 of article 9 of the constitution prohibits the General Assembly from creating debts against a municipal corporation

only for purposes which are purely corporate, and does not prohibit the imposition of such taxes in the performance of duties which relate to the general welfare of the State or which may be performed by the municipal corporation as an agency of the State.

4. SAME—a county is an agent of the State in the exercise of the police power. A county is a mere agent of the State, and the power of the General Assembly is paramount over the property of citizens in such political subdivisions as to all provisions for the exercise of the police powers.

5. SCHOOLS—charge for the care of dependent girls in industrial schools is claim fixed by law, for which suit may be brought against county. The sum of \$15 per month to be charged against a county under section 9 of the act for the care of dependent girls at industrial schools is a definite claim fixed by law, for which the county should make an appropriation according to the number of dependents cared for, and for which suit in assumpsit may be brought against the county by the schools to which the girls are sent.

6. MUNICIPAL CORPORATIONS—limitation on power to levy is not necessarily a limitation on power to contract a debt. A limitation on the power of a municipality to levy taxes is not necessarily a limitation on the power to contract a debt.

7. SAME—assumpsit may be brought against a municipality for failure to perform duty enjoined by law. In legal contemplation a municipality assumes to perform whatever duty the law enjoins upon it, and assumpsit lies upon all such implied contracts that are broken.

8. COUNTIES—legal claims fixed by law cannot be defeated by failure to make appropriations. Neither section 2 of the Juul law nor the provisions of paragraph 6 of section 61 of the act requiring the county commissioners of Cook county to adopt an annual appropriation bill can have the effect of defeating legal claims fixed by law, where the county board fails to do its full duty in allowing and paying the same, and a failure to make an appropriation in any year will not relieve the county of the obligation to provide for such payment by an appropriation in some succeeding year.

APPEAL from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding.

MACLAY HOYNE, State's Attorney, (CHARLES CENTER CASE, JR., and JOHN E. FOSTER, of counsel,) for appellant.

HURLEY & BAER, (TIMOTHY D. HURLEY, of counsel,) for appellees.

Mr. JUSTICE DUNCAN delivered the opinion of the court :

Appellees, the St. Hedwig's Industrial School for Girls and the Polish Manual Training School for Boys, brought separate actions in assumpsit in the circuit court of Cook county against appellant, the county of Cook, to recover charges for the unpaid tuition, maintenance and care of dependent children committed to said schools by the juvenile branch of said circuit court in the years 1915, 1916 and 1917. The cases were consolidated for a hearing in the lower court and the trial was had before the court without a jury, and propositions of law were submitted properly raising all questions of law contended for by appellant as governing the cases. Judgment was rendered in favor of the St. Hedwig's Industrial School for Girls in the sum of \$20,295.75 and in favor of the Polish Manual Training School for Boys in the sum of \$11,934.13. This appeal is prosecuted direct to this court on the ground that the validity of statutes was properly raised by the issues in the lower court.

There is no controversy over the facts. The stipulated and proved facts, so far as material to the legal questions raised, are the following: Appellee the St. Hedwig's Industrial School for Girls owns and conducts in the county of Cook an industrial school for girls, and duly organized for that purpose under an act entitled "An act to aid industrial schools for girls," in force July 1, 1879, as amended. During the years 1915, 1916 and 1917 numerous girls duly adjudged dependent by the circuit court (juvenile branch) of said county were committed by said court to said school under and by virtue of the provisions of said Industrial School act, for all of whom appellee furnished and supplied tuition, care and maintenance during all of said years at a per capita cost of \$15 and more per month for each girl. Appropriations were duly made by appellant for the year 1915 in the sum of \$27,000, which sum was paid out by

appellant to appellee, leaving a balance unpaid for that year on appellee's claim aforesaid of \$4353.25. For the year 1916 appellant appropriated and paid to appellee upon its claim the sum of \$30,500, leaving a balance due appellee for that year of \$7720.50. For the year 1917 appellant appropriated and paid to appellee on its claim the sum of \$27,500, leaving due it for that year \$8222. The several amounts appropriated and paid by appellant to appellee for said years were estimated by the county board of appellant to be sufficient to pay appellee for all girls committed, as aforesaid, at the rate of \$15 per month for each girl,—the sum charged by appellee in this claim,—but the appropriations were insufficient to pay the same as above shown, and appellant has failed to make, and has not at any time made, any other or further appropriations or payments to appellee. The board of commissioners of appellant in the first quarter of all said fiscal years also made appropriations for all other purposes for which it was required to raise and collect revenues, and specified the several objects and purposes for which the appropriations were made and the several amounts for each object and purpose. Said appropriations consisted of appropriations for all definite charges imposed upon the county by statute and for all charges imposed by statute the aggregate amount of which is not fixed by statute, and appropriations for all other liabilities and expenses deemed necessary by the board to be paid by the county or that were incurred by it for those years, so far as the assets and resources of the county would permit, and that the limit of taxes allowed by law was so levied and collected by it, and that all of such taxes and resources of the county have been collected and exhausted in the payment of such appropriations; that the same things were done for the year 1918, and that all the taxes and resources of the county for that year have been paid out except what is especially limited and required for appellee's claim and for other appropriations for that year. Said appropria-

tions included for cost of publication of assessment lists for 1915 and 1916 an amount in excess of the amount appellee seeks to recover in this suit for those years and to the amount of \$5000 for 1917. They also included an amount for contingent fund in 1915 of \$7127.58, and for contingent fund in 1916 and 1917 amounts in excess of appellee's claim for those years. Said appropriations included an amount for building fund in each of the years 1915, 1916 and 1917 in excess of appellee's claim. In all of the said years appellant made appropriations for nine other industrial schools for girls. In none of said years did the county provide or maintain any institution or place to which girls adjudged dependent must be lawfully committed. In none of those years did the State of Illinois have or maintain such an institution or place, except the State institution at Geneva. The children for whose care and maintenance appellee sues were committed by the circuit court to appellee's school from time to time during the latter months in 1915, 1916 and 1917 upon petitions filed by responsible citizens, usually a probation officer, in which proceedings the president of the board of commissioners of appellant was notified and in which he entered his appearance. The court found and decreed in each case that the child committed to the institution was dependent and was made a ward of the court. The children thus committed to this school are taught the regular branches up to the eighth grade, and in addition thereto they are given industrial training. They also are given, without extra charge, the attention of expert dentists and physicians, who look carefully after their teeth and their health, and render such professional services to them as may be necessary or beneficial, according to the very best known methods. They are also placed in good homes after they leave this school, and are reported as so placed to the State Board of Visitation, which visits them at their homes. Appellee's institution was built by private contributions, neither the county nor the State having con-

tributed anything thereto, and is under the control of the Catholic church. Appellee was given certificates for all of said years by the department of public welfare that it has examined into the management of the school according to section 13 of an act entitled "An act to regulate, examine and control dependent, neglected and delinquent children," and found that it was competent and had adequate facilities to care for its children. It was further proved that the charge of appellee was \$15 per month for each dependent girl committed to it in said county, (the amount allowed by statute,) and that the balance due it for said years was \$20,295.75. Similar proof and stipulations were made on behalf of the Polish Manual Training School for Boys, showing a balance due it from appellant, at \$10 per month for each boy so committed from Cook county, of \$11,934.13. There is a further stipulation that the legal questions and facts involved in the two cases are identical in principle, except as to the amount charged per capita for boys committed and as to amount due, and that the facts in the case brought by the St. Hedwig's Industrial School for Girls are sufficient to warrant this court in affirming the judgments in both cases, if, and only in case, the same are sufficient to entitle the St. Hedwig's Industrial School for Girls to a judgment of affirmance. The cases were therefore consolidated and submitted for hearing in this court on the record in the case of the St. Hedwig's Industrial School for Girls against appellant, and a short record in the other case, by agreement.

Section 9 of the act for industrial schools for girls provides: "For the tuition, maintenance and care of dependent girls committed to an industrial school for girls, the county from which they are sent shall pay to the industrial school for girls, to which they may be committed, the sum of fifteen (\$15) dollars per month for each dependent girl under the age of eighteen (18) years, so committed; and upon the proper officer rendering proper accounts there-

for, quarterly, the county board shall allow and order the same paid out of the county treasury, provided that no charge shall be made against any county by any industrial school for girls on account of any dependent girl in the care thereof, who has been by said school put out to a trade or employment in the manner hereinafter provided."

It is contended by appellant that this section is invalid because it violates section 3 of article 8 of our State constitution, which provides that neither the General Assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation or pay from any public fund whatever anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other scientific institution controlled by any church or sectarian denomination whatever, nor shall any grant or donation of land, money or other personal property ever be made by the State or any such public corporation to any church or for any sectarian purpose. The validity of said act has heretofore been considered by this court and the act declared valid and not in violation of said section of the constitution. (*Dunn v. Chicago Industrial School*, 280 Ill. 613; *Dunn v. Addison Manual Training School for Boys*, 281 id. 352; *Trost v. Ketteler Manual Training School*, 282 id. 504.). This court expressly held that the pay of \$15 a month to industrial schools for girls conducted by any religious denomination does not violate that section of the constitution prohibiting a donation of public funds to such denominational institutions, where such sum is less than the actual cost for care of such girls at such institutions and at the State institution. In such a case the State or the municipality does not pay the full price for the benefits or services received by it and is the real donee. One who pays less for benefits or services than the actual cost of the same is not making a donation by such a payment.

It is argued by appellant that the sum of \$15 per month specified in said act to be paid is not a definite sum or charge per month fixed by law but is merely a sum or charge per month which the county cannot exceed, and that the sum per month that the county shall pay for such services is discretionary with the county board and that it is for it to determine and fix the sum to be paid. This contention cannot be sustained. The sum so fixed is just as definite as the amount fixed by law to be paid shorthand reporters for their official work in the circuit court, which is a specified amount per day. In *People v. Raymond*, 186 Ill. 407, this court held that services for shorthand reporters must be considered as "other charges fixed by law," and that paragraph 6 of section 62 of the laws of 1887, requiring the board of Cook county to pass an appropriation bill, does not deprive the board of power to provide for and pay such charges so imposed by law. The only thing not definitely determined and fixed by the statute is the aggregate amount that the county shall pay each year for such services, and in the very nature of things this amount can not be so fixed. It is limited only by the amount of such services actually required, and the county board has no discretion in fixing either the amount paid per month for each child or the aggregate amount to be allowed. The statute positively provides that the county board shall allow and order the same paid out of the county treasury upon the proper officer rendering proper accounts therefor, quarterly. The fact, if such could be the fact, that the amount allowed by statute might in some cases be greater than the actual cost per girl to the institution does not render said section unconstitutional when applied to the facts in this case. The actual proof shows that it is less than the actual cost, and it is well known that said sum is very little, if any, over half the cost to maintain the girls at the State institution at Geneva. The legislature evidently fixed said sum at a charge that would necessarily be less than the actual cost

of such maintenance, instruction and training. By the acts that are here in question the State and the county are saved millions of dollars that they would otherwise have to expend for building, maintaining and conducting institutions to have such children maintained, educated and trained.

The provisions of section 9, *supra*, do not violate section 10 of article 9 of the constitution, which provides that the General Assembly shall not impose taxes upon municipal corporations, or the inhabitants or the property thereof, for corporate purposes, etc. The General Assembly may impose taxes, local in their character, against a municipal corporation or the inhabitants thereof if required for the general good of the State, because such taxes are not merely and only for corporate purposes. Said section of the constitution only prohibits the General Assembly from creating debts against a municipal corporation for purely corporate purposes. The General Assembly may compel taxation by a municipal corporation for the performance of duties as an agency of the State government and to discharge duties and obligations properly resting upon it. It may compel a municipal corporation to perform duties which relate to the general welfare and security of the State, although the performance of the duty results in a tax or in creating a debt to be paid by taxation. It may require a county to build a court house, a jail or a bridge, to support paupers or to establish necessary regulations for public health and safety, and may require the county to pay the expense of summoning jurors and the expense of jury commissioners, and may require a municipal corporation to pay its proportionate cost of the change of grades in public roads and railroads. (*People v. County of Williamson*, 286 Ill. 44; *Trustees v. Lincoln Park Comrs.* 282 id. 348; *Chicago, Milwaukee and St. Paul Railway Co. v. Lake County*, 287 id. 337.) The maintenance and care of dependent children falls within the same class of duties and obligations as the support of paupers, the building and maintaining jails and

the administration of justice. Counties are but local subdivisions of the State clothed with corporate powers of a governmental character. A county, in such case, is a mere agent of the State, and the power of the General Assembly is paramount and complete over the property of citizens in such political subdivisions as to all provisions for the exercise of the police power.

The facts stipulated and proved in this case do not raise any question as to the validity of appellees' claims on account of the county being indebted beyond the constitutional limit. There is no suggestion anywhere in the facts that Cook county was indebted in any sum for any purpose at the times the several appropriations were made to appellees. Section 12 of article 9 of the State constitution, limiting the amount of the total valid and enforceable indebtedness against a county, city, township, school district or other municipal corporation, is not properly involved in this case.

The provisions of paragraph 6 of section 61 of chapter 34, requiring the county commissioners of Cook county to adopt an annual appropriation bill, in and by which the board shall appropriate such sums of money as may be necessary to defray all necessary expenses and liabilities of Cook county to be by said county paid or incurred during and until the time of the adoption of the next annual appropriation bill, etc., do not bar appellees' recovery in this suit. That paragraph also provides that the appropriation for the cost of publication of the assessments shall take precedence over all the other appropriations, excepting the provision for principal and interest of county indebtedness, the ordinary current salaries of county officials and employees, the maintenance of county property and institutions, including courts and juries, dieting occupants of the jail, prisons, hospitals and industrial schools, and the cost of elections required by law. It also expressly provides that such appropriations shall take precedence of any ap-

appropriations for contingent or building funds, and that if the tax actually collected for any year shall be less than the total amount of the appropriation, the items of appropriation following such resolution after such appropriation for publishing assessments, in the order therein directed, shall be first abated before the appropriation for such publication of tax assessments shall be reduced. It further provides that after the adoption of such appropriation bill the board shall not make any further or other appropriation prior to the adoption of the next succeeding annual appropriation bill, and that the board will have no power, directly or indirectly, to make any contract or to do any act which shall add to the county expenditure or liabilities in any year anything or any sum over and above the amount provided for in the annual appropriation bill for the fiscal year. Said paragraph concludes as follows: "Nor shall anything herein contained be construed to deprive the board of power to provide for and cause to be paid from the county funds any charge upon said county imposed by law, without the action of the board of commissioners, including fixed salaries of officers required by law to be paid from the county treasury, and to pay jurors fees and other charges fixed by law."

If appellant's claim be conceded that the foregoing provisions require appropriations to be made for payment of charges fixed by law, it cannot be conceded that said section, on the facts of this case, bars appellees' right of recovery, although appellant may have paid out, during the years in question, all of its income and revenues, from all sources, for appropriations the aggregate of which extends to the limit of taxation for those years. There is no showing in this record that the county could not have paid during those years the full sums due appellees if it had made sufficient appropriations therefor and had properly abated the other appropriations over which appellees' claims had precedence. Appellees' claims are a charge upon the

county imposed by law, without any action of the board whatever. It was the duty of the county to make the appropriations large enough to pay appellees, and failing to do so is no ground for appellant's claim that appellees can not recover their just and legal claims. A limitation in the power to levy taxes is not necessarily a limitation in the power to contract a debt. (*County of Coles v. Goehring*, 209 Ill. 142.) Failure of the board to do its duty cannot deprive appellees of their action. (*County of Perry v. City of DuQuoin*, 99 Ill. 479.) In legal contemplation, a municipality assumes to perform whatever duty the law enjoins upon it. Appellees had a right of action in assumpsit against appellant for a failure to pay appellees the amount required by the statute. Assumpsit lies upon all such implied contracts that are broken. *Seagraves v. City of Alton*, 13 Ill. 366.

For the same reasons section 2 of the Juul law (Hurd's Stat. 1915, p. 2229,) can have no legal effect to bar appellees' right of recovery, which section provides for a reduction by the county clerk of the rate of tax *pro rata* in the event the aggregate exceeds the rate therein provided and in case no election be made by the municipality to distribute such reduction. This provision of the Juul law, as well as said paragraph 6 with reference to the annual appropriation bill, does not intend that legal claims fixed by law, of the character of those now under consideration, should be defeated by any failure of the county board to do its full duty in allowing and paying the same. In case it should fail to make any appropriation whatever for such purpose for any year, that fact would furnish no reason why it would not be under obligation to make proper provision for paying the same by proper appropriations in some succeeding year.

The judgment of the circuit court is affirmed.

Judgment affirmed.

(No. 12679.—Reversed and remanded.)

JAMES S. JACKSON, Defendant in Error, *vs.* EDWARD C.
KOHLER *et al.* Plaintiffs in Error.

Opinion filed October 27, 1919.

1. **BROKERS**—*when motion for instructed verdict is properly denied.* In a suit by a real estate agent to recover commissions under a brokerage contract, if the terms of his agreement with the defendants and his knowledge of the conditions upon which the enforcement of their contract with the purchaser depended are disputed questions, the defendants' motion for an instructed verdict in their favor is properly denied.

2. **SAME**—*what evidence admissible to show terms of brokerage contract.* Where a contract with a broker to secure an exchange of properties is made through conversations, a statement in the written contract of exchange in regard to commissions, as well as evidence of the conversations constituting the brokerage contract, is admissible in an action by the broker for his commissions.

3. **SAME**—*burden is on broker suing for commissions to prove his contract.* In an action by a real estate agent to recover commissions in a brokerage contract the burden is on the plaintiff to prove his contract, and an instruction should not put the burden on the defendants to prove a special agreement that the broker was not to be paid in case the deal did not go through, where there is no special contract on which such defense is founded other than the contract on which the suit is brought, the terms of which are disputed.

4. **SAME**—*when instruction should not refer to ordinary brokerage contract.* Where a real estate agent sues for commissions on a special contract with the defendants as to the terms of which the parties disagree, an instruction should not refer to an "ordinary contract made without any conditions, the broker employed in the usual way," but the jury should be instructed in regard to the particular contract on which suit is brought.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Municipal Court of Chicago; the Hon. JOHN RICHARDSON, Judge, presiding.

STEDMAN & SOELKE, for plaintiffs in error.

LOUIS SALINGER, for defendant in error.

Mr. CHIEF JUSTICE DUNN delivered the opinion of the court:

James S. Jackson recovered a judgment for \$3000 in the municipal court of Chicago against Edward C. Kohler and Henry A. Kohler, which the Appellate Court affirmed, and the defendants sued out a writ of *certiorari* to review the record.

The plaintiffs in error owned a six-story building located on lots 3, 4 and 5 in block 54, in Carpenter's addition to Chicago, and certain leasehold interests in those lots. The defendant in error was a real estate broker, and through him an agreement was made between the plaintiffs in error and Frederick A. Hastings for the exchange of their building and leasehold estates for certain real estate called the Chalforte Apartments. The contract contained the following provisions: "Each party shall pay their own commissions, attorney's fees and all other costs incidental to his part of the negotiation. Brokerage fees to be paid as follows, to-wit: Party of the first part to pay to Jackson Bros. two thousand no/100 dollars. Party of the second part to pay to Jackson Bros., as agreed, dollars. * * * This contract made with the understanding that the consent of Henry Gerstley and the Billings lessors are to be obtained to the transfer of their leases. All deeds to be passed and this negotiation to be closed within thirty days from the date of this agreement. Time is hereby declared to be of the essence of this agreement." The plaintiffs in error were the parties of the first part in this contract. The contract described the building as located on lots 4 and 5, but, in fact, the footings of the walls extended two feet and eleven inches over on the west twenty feet of lot 3. The plaintiffs in error's lease from Gerstley for lots 4 and 5 was for ninety-nine years from February 1, 1907, and the Billings lease of the west twenty feet of lot 3 was for thirty years from May 1, 1907. Each lease provided that it could be

assigned only by the written consent of the lessor, and the Gerstley lease provided for the construction of a building on it not later than May 1, 1908, the floors of which should be capable of bearing a live load of one hundred and fifty pounds for every square foot of surface and required that the construction should conform to the ordinances of the city of Chicago in relation to buildings. At the time of the contract in question notices of the building department of the city were posted in the building prohibiting the loading of the floors of the building beyond one hundred pounds to the square foot. The plaintiffs in error claimed that their agreement with Jackson was that no commission should be payable unless the contract was completed by performance by Hastings nor unless the consent of the lessors to the assignment of the leases was obtained by Jackson. They also claim that Jackson was acquainted with the terms of the leases, the fact that the buildings stood in part on lot 3 and the insufficiency of the floors under the terms of the Gerstley lease but that he omitted from the contract with Hastings all reference to these matters, and that therefore, because of Jackson's fault, the contract with Hastings could not be enforced and no commissions were due the broker. Hastings, the purchaser, testified that he was ready to perform the contract on his part if the defendants' property could be delivered according to its terms, but not otherwise. The contract required the defendants to convey the building located on lots 4 and 5 and assign a ninety-nine-year lease of those lots, as well as to assign the thirty-year lease of the west twenty feet of lot 3. The building was not entirely located on lots 4 and 5 but extended over on lot 3 two feet and eleven inches, and this was a material difference in the subject matter, since the lease of the part of lot 3 would expire sixty-nine years before that of lots 4 and 5. The purchaser also objected to the failure of the building to conform to the requirements of the Gerstley lease. The contract never was performed. In this action

brought by Jackson for his commission the terms of the agreement between the plaintiffs in error and Jackson, his knowledge of the terms of the leases, his undertaking to procure the consent of the lessors to the assignment of the leases, were all disputed questions. The testimony of the plaintiffs in error and the defendant in error was in many particulars directly contradictory. The plaintiffs in error's motion for an instructed verdict in their favor was therefore properly refused.

The plaintiffs in error insist that because of the provisions of the contract requiring the consent of Henry Gerstley and the Billings lessors to be obtained to the transfer of their leases and providing that all deeds should be passed and negotiations closed within thirty days the contract was not enforceable against Hastings. The contract to assign the leases included an agreement, even though it was not stated, to procure the consent of the lessors if it was necessary to a valid assignment, and the expression of an understanding that such consent should be obtained was merely an express acknowledgment on the part of the plaintiffs in error that they would be required to obtain such consents in order to perform their part of the contract.

The defendant in error was not a party to the contract between the plaintiffs in error and Hastings. The statement in regard to the commissions in that contract is admissible as evidence of the agreement between the plaintiffs in error and the defendant in error as to commissions, but their contract was made through conversations occurring between plaintiffs in error and the defendant in error while the negotiations with Hastings were pending, and evidence of these conversations was properly admitted to show the terms of the contract.

The court gave to the jury instruction No. 11, as follows:

"The court instructs the jury that if you believe from the evidence that the plaintiff rendered service to the de-

fendants, at the defendants' request, by getting defendants and Hastings together in a contract for the exchange of property, the burden of proving that there was a special contract that the plaintiff was not to be paid for said services in case the deal did not go through rests with the defendants, and they must establish such special contract by a preponderance of the evidence or their defense founded upon such special contract fails entirely."

This instruction was erroneous. The plaintiff's claim was based upon an express contract, and there was only one. The burden of proving it was on the plaintiff. There was no special contract on which the defense was founded other than the special contract on which the plaintiff's claim was founded and which the plaintiff was bound to prove in order to recover. The burden of proof as to the terms of that contract was on the plaintiff throughout and there was no burden on the defendants to prove any part of it. Other instructions stated the rule correctly, but they could not cure the error of this instruction, which gave an incorrect rule for the consideration of the evidence.

Instruction No. 12 was also misleading. It was based upon an "ordinary contract made without any conditions, the broker employed in the usual way." In this case there was a special contract and the parties disagreed about its terms. There was no reason for referring to an ordinary contract or the usual way, but the jury should have been instructed in regard to this particular contract.

The judgments of the Appellate Court and of the municipal court are reversed and the cause is remanded to the municipal court.

Reversed and remanded.

(No. 12534.—Judgment affirmed.)

THE PEABODY COAL COMPANY, Plaintiff in Error, vs. THE INDUSTRIAL COMMISSION *et al.*—(LUM BARTH, Defendant in Error.)

Opinion filed October 27, 1919.

1. WORKMEN'S COMPENSATION—*what objection must be raised on the hearing.* An objection that the testimony of expert witnesses determines an ultimate issue of fact in the proceeding before the Industrial Commission should be made on the hearing and cannot be raised for the first time in the circuit court nor in the Supreme Court.

2. SAME—*when circuit court may enter judgment for an award different from decision of Industrial Commission.* Where the facts are not disputed, clause 2 of paragraph (f) of section 19 of the Workmen's Compensation act authorizes the circuit court to render such decision for compensation as is justified by law, and where it is clear that the Industrial Commission misapprehended the law applicable to the facts proved, the circuit court may enter a judgment for an award different from the decision of the commission.

3. SAME—*expert evidence is to be treated as other evidence.* Expert evidence is legal and competent evidence, and is to be received and weighed as other evidence by triers of fact in compensation cases.

4. EVIDENCE—*how expert testimony should be weighed.* The weight of expert testimony should be determined by the character, capacity, skill and opportunities for observation and state of mind of the experts themselves as seen and heard and estimated by the jury and by the nature of the case and its developed facts.

5. SAME—*when court should not disregard testimony of expert witnesses.* Where the facts are proved altogether by expert witnesses and are wholly uncontradicted, and all the witnesses appear to be unbiased, well skilled in their profession and fully competent to give correct information and opinions based upon the actual facts, the court is not justified in disregarding such evidence and holding the facts as not established.

WRIT OF ERROR to the Circuit Court of Williamson county; the Hon. D. T. HARTWELL, Judge, presiding.

BATES, HICKS & FOLONIE, (DENISON & SPILLER, of counsel,) for plaintiff in error.

GEORGE R. STONE, for defendant in error.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

Defendant in error, Lum Barth, was injured June 23, 1916, by an accident arising out of and in the course of his employment as a coal miner while working for the Peabody Coal Company and which resulted in a compound fracture of the left leg, necessitating surgical and medical attention and confining him to his bed for four months and four days. Compensation was voluntarily paid him by the plaintiff in error, the Peabody Coal Company, to the extent of \$240.67, prior to the commencement of proceedings under the Workmen's Compensation act. A hearing was had before the arbitrator on August 4, 1917, who found that the petitioner was entitled to receive from plaintiff in error \$7.79 per week for 78 weeks for temporary total incapacity for work, and the sum of \$2 per week for a period of 175 weeks, "as provided in section 8, paragraph (d), of the act as amended, for partial disability." Defendant in error petitioned the Industrial Commission for a review of the award, and the commission found the award of the arbitrator correct and ordered it to stand as the decision of the commission. Defendant in error then sued out a writ of *certiorari* from the circuit court of Williamson county. That court set aside the award and adjudged that the defendant in error was entitled to 83 weeks at the rate of \$7.79 per week for temporary total disability, and 333 weeks at the rate of \$2 per week for permanent partial disability, "for the reason that the said injury sustained * * * was twenty-five per cent permanent disability," and certified that the cause is one proper to be reviewed by this court.

The only questions presented for our consideration are (1) whether or not the circuit court had jurisdiction to enter a judgment in the case different from that fixed by

the Industrial Commission; and (2) whether the award as fixed by the court could be sustained on evidence of expert witnesses as to the extent of the injury, which plaintiff in error claims was inadmissible.

The evidence in this case shows that Dr. D. D. Hartwell rendered first aid to defendant in error and was paid for his services by plaintiff in error. Defendant in error then declined to accept the further services of Dr. Hartwell and selected and employed his own physician. Three physicians, Drs. Zack Hudson, H. D. Norris and I. C. Walker, testified, in substance, that defendant in error had a compound fracture of the left leg below the knee and that the ends of the fragments of bone protruded through the flesh; that there was coal dust and dirt in the wound, and that he suffered greatly from shock and was in bed continuously four or five months; that the flesh was all torn up for a radius of eight or ten inches and the fracture was three and a half or four inches above the ankle; that there was considerable sloughing on the front, back and internal portions of the leg and that about one-eighth of the posterior portion of the leg was gone; that the fibula is pulled in, and that its union is imperfect, the alignment bent and at the point of the break there is a great amount of cartilage. All three of the physicians were unanimous in their testimony that the defendant in error was then (August 4, 1917,) totally disabled from doing any work and that such total disability would continue six months longer, and that after he had made the best possible recovery from his injury he would for all time thereafter be partially disabled from performing his work at mining to the extent of twenty-five per cent, and that he would be incapacitated to the same extent from performing any other labor that would require him to stand on and use his lower limbs, because of the loss of the use of his left leg. They were also of the opinion that there might be some kinds of work in which he

would be fully capacitated to do full work, in which he did not have to stand on or use his feet.

The principal complaint made by the plaintiff in error is that the testimony of defendant in error's expert witnesses that his partial disability permanently impaired his earning capacity twenty-five per cent, etc., was inadmissible because an ultimate issue of fact before the arbitrator and the commission. It may be conceded that such is true, but plaintiff in error is in no position whatever to complain of the incompetency of this testimony as there was no such objection made either before the arbitrator or before the commission. Besides, much evidence of the same objectionable character was elicited from the witnesses on cross-examination by plaintiff in error's counsel. The triers of the facts in this case and the attorney for defendant in error had no notice of any claim that said evidence was incompetent, and thereby were lulled into the belief that plaintiff in error regarded the evidence as competent. Had the evidence been objected to on the hearing, defendant in error's counsel would have had the opportunity to make proof of the facts by evidence entirely unobjectionable. Plaintiff in error cannot be heard now to complain of the evidence on this hearing and such question could not be raised for the first time in the circuit court. No evidence whatever was offered on behalf of plaintiff in error. The evidence was uncontroverted, and proved positively that defendant in error was rendered temporarily totally disabled from following his occupation from the 23d day of June, 1916, to August 4, 1917, and that he would continue to be temporarily totally disabled for six months thereafter, or until February 4, 1918. Under the provisions of paragraph (b) of section 8 of the Workmen's Compensation act he is entitled to be paid compensation for temporary total incapacity for the entire time of his disability, excluding the first eight days thereof. The correct calculation of the time will be found to be 83 full weeks for temporary total dis-

ability. The circuit court was therefore right in making this calculation and in allowing defendant in error compensation for 83 weeks at \$7.79 per week, as there was no dispute as to the amount per week that he was entitled to recover, because the statute authorized it to render such decision as is justified by law where the evidence is undisputed. (Hurd's Stat. 1917, chap. 48, sec. 19, par. (f), clause 2, p. 1461.)

The provisions of the Workmen's Compensation act found in paragraph (d) of section 8 are: "If, after the injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall * * * receive compensation * * * equal to one-half of the difference between the average amount which he earned before the accident, and the average amount which he is earning or is able to earn in some suitable employment or business after the accident." The undisputed proof in the record is that defendant in error is permanently partially incapacitated from pursuing his occupation as coal miner or from pursuing any other occupation in which he would be required to stand on and use his legs, and that his capacity to pursue such occupation will only be seventy-five per cent. The plaintiff in error does not question the correctness of the court's allowing \$2 per week for a period of 416 weeks, less 83, the number of weeks allowed for total disability, if the evidence in the record is sufficient to sustain that finding, as it is undisputed. Its only claim for the reversal of the court in this particular is that uncontroverted expert evidence is not binding upon triers of facts and that the Industrial Commission had a right to substitute its judgment for the judgments or opinions of the expert witnesses, and that its finding that the defendant in error was entitled to \$2 per week for only 175 weeks was binding on the circuit court and this court. There is no evidence in the record and no reasonable theory of the law upon which the award

of the Industrial Commission can be sustained in this particular. It can only be explained on the supposition that the commission allowed an award for the loss of a leg or the complete loss of its use, under paragraph (e) of section 8. That section was not applicable to this case, as there was no loss of a leg or permanent and complete loss of its use, as required by said paragraph then in force.

Expert evidence is legal and competent evidence and is to be received, treated and weighed precisely as other evidence by triers of fact in this character of cases and by jurors in cases at law. The weight of such testimony should be determined by the character, capacity, skill and opportunities for observation and the state of mind of the experts themselves, as seen and heard and estimated by the jury, and by the nature of the case and its developed facts. (*Louisville, N. C. & T. R. R. Co. v. Whitehead*, 71 Miss. 451.) Where the facts are proven altogether by expert witnesses and they are wholly uncontradicted, and the witnesses all appear to be fair and unbiased, competent and well skilled in their profession and fully competent to give correct information and opinions based upon the actual facts, as shown in this case, there is no good reason for holding that a court may disregard the evidence as not establishing the facts because much of the evidence is opinion evidence or the evidence of expert witnesses. Defendant in error established the necessary facts by testimony uncontroverted, and the fact that three of the witnesses were doctors and gave expert testimony after detailing the facts upon which such expert testimony was based did not authorize the Industrial Commission to disregard the evidence. There is no showing in the record that it did so, but a clear showing that it misapprehended the paragraph or provision of the law applicable to the facts proved. The court in entering its judgment merely passed upon questions of law and reviewed no question of fact. When the necessary facts are proved and are wholly undisputed it is a

mere question of law as to what amount of compensation an injured party is entitled to receive, where he is petitioning for compensation under the Compensation act.

The judgment of the circuit court is correct, and it is affirmed.

Judgment affirmed.

(No. 12434.—Reversed and remanded.)

THE PEOPLE *ex rel.* Henry Stuckart, County Collector,
Appellant, *vs.* H. C. KOHLER, Appellee.

Opinion filed October 27, 1919.

1. TAXES—*when objection to taxes may be amended.* On the application of the county collector for judgment for taxes, an objection that the valuation was raised during the quadrennial period without notice to the objector is sufficiently clear to be amended at the hearing by adding the averment that there has been no physical change in the property.

2. SAME—*objector has burden of showing failure to give notice of increase in valuation.* Taxing authorities are presumed to have done their duty, and as every presumption will be indulged in favor of the validity of their acts, an objector who avers that the assessed valuation of his property was raised during the quadrennial period without notice to him has the burden of proving such averment.

APPEAL from the County Court of Cook county; the Hon. S. N. HOOVER, Judge, presiding.

MACLAY HOYNE, State's Attorney, (CHARLES CENTER CASE, JR., of counsel,) for appellant.

GEORGE P. FOSTER, for appellee.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

This is an appeal from a judgment of the county court of Cook county sustaining appellee's objections to the validity of certain taxes assessed against appellee's property for the year 1917 and denying the application of the county collector for judgment.

The record discloses that appellee's taxes as fixed by the board of review of Cook county amounted to \$329.34; that he paid on account of said taxes the sum of \$250; that he objected to the payment of the difference, amounting to \$79.34, on the ground that the valuation of his real estate, which was fixed in 1915 for the quadrennial period at \$4005, was raised without notice to him to \$5372, and that the valuation was unfair and inequitable. Upon motion by appellant for judgment appellee filed his written objection, setting forth the above reasons why judgment should not be entered against his property for the sum of \$79.34. Appellant's motion to strike the objection from the files on the ground that the same was vague, uncertain and did not specifically state the particular cause of objection was overruled. During the hearing a motion by appellee for leave to file amended objections was allowed, over objection of appellant. The written objections already filed were amended by adding the averment that there had been no physical change in the property of appellee, nor any change in the value thereof by reason of any alterations or additions or improvements, since April 1, 1916, and prior to April 1, 1917. Appellant moved to strike the amended written objection from the files for the reason that it did not set out clearly the particular causes of the objections, which motion was overruled. While the written objection as filed or as amended is not stated in very clear terms, yet it was so worded that the representatives of the public would readily understand that the property owner was objecting because the quadrennial assessment had been unlawfully raised without notice to him. The court was justified in permitting the amendment to be made and in refusing to strike the amended objection. *Chicago, Peoria and St. Louis Railway Co. v. People*, 214 Ill. 471; *People v. Chicago, Burlington and Quincy Railroad Co.* 282 id. 206; *People v. Shortall*, 287 id. 150.

There is no contention that appellant did not make out a *prima facie* case. Therefore the burden of showing the invalidity of the tax rested upon the appellee. *People v. Keener*, 194 Ill. 16; *People v. Bates*, 266 id. 55; *People v. Hassler*, 262 id. 133; *People v. Chicago and Eastern Illinois Railroad Co.* 281 id. 177.

The principal contention is that the trial court erred in not holding that there was a failure on the part of appellee to sustain his objection "that the assessed valuation of his property was raised without notice to him." The burden rested upon appellee to show that the valuation of his real estate had been raised and that it had been raised without notice to him. (*People v. Shortall*, *supra*.) Taxing authorities are presumed to have done their duty, and every presumption will be indulged in favor of the validity of the acts of such officers. (*People v. Keener*, *supra*; *People v. Chicago and Eastern Illinois Railroad Co.* *supra*.) Appellee did not testify. It was not proved that notice had not been given, nor was it proved that notice was not actually received. The only evidence in the record with reference to notice is that given by appellee's witness Lloyd. This witness testified that he had no positive knowledge on the subject, and did not, in fact, know whether or not there was any notice given with reference to the intention to increase the assessed valuation of this property. There was a total failure of proof that the assessed valuation of appellee's property had been raised without notice to him, and such being the case, the trial court erred in sustaining the objection to the tax and in refusing judgment and order of sale applied for by the appellant.

The judgment of the county court of Cook county will be reversed and the cause remanded to that court for further proceedings in conformity with the views herein expressed.

Reversed and remanded.

(No. 12818.—Judgment affirmed.)

M. I. TUMY, Appellee, vs. CARL H. MAYER *et al.*—(THE GULBRANSEN-DICKINSON COMPANY, Appellant.)

Opinion filed October 27, 1919.

1. CHOSSES IN ACTION—*what is a chose in action.* A chose in action is property of which the owner does not have the actual or constructive possession but for which an action may be brought to reduce it to possession.

2. SAME—a *present right of action is not necessary.* While a chose in action is a personal right to demand money or property by an action a present right of action is not necessary, and the evidence of the right to the money or property may be a note or contract, provided it is absolute. •

3. DEBTOR AND CREDITOR—*judgment creditor may acquire a lien on chose in action.* A judgment creditor may acquire a lien on a chose in action belonging to the debtor by filing a bill in chancery and having it applied to the satisfaction of his judgment; but a creditor can have no greater right to the property than his debtor has, and the chose in action must be a fixed present right of the owner to recover the money or property by action in his own name.

4. SAME—*unearned commissions cannot be subjected to claim of judgment creditor.* Where a judgment creditor files a bill to have choses in action belonging to the debtor applied to the satisfaction of his judgment, unearned commissions cannot be subjected to the claim, as the court cannot compel the debtor to render his personal services and earn the commissions for the creditor.

APPEAL from the First Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding.

EDWARD B. HEALY, for appellant.

KING, BROWER & HURLBUT, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

On June 14, 1916, the appellee, M. I. Tummy, filed a bill of complaint in the circuit court of Cook county against Carl H. Mayer, Anna D. Mayer, his wife, and others, alleg-

ing the recovery of a judgment against Carl H. Mayer in the municipal court of Chicago for \$1700 and costs, the return of an execution unsatisfied, "No property found," and that Mayer had fraudulently transferred property and effects to his wife, Anna D. Mayer. On October 10, 1916, the appellee filed a supplemental bill, making the appellant, the Gulbransen-Dickinson Company, a defendant, and alleging that it had become indebted to Mayer in the sum of \$500, and would become further indebted on the fulfillment of a contract between it and Mayer whereby Mayer would become entitled to commissions upon merchandise sold in the future. Summons was issued and served on the appellant on October 13, 1916, and it filed its answer on April 30, 1917, denying that it had become indebted to Mayer, and alleging that it did not know whether it would or would not become indebted to him in the future upon the fulfillment of the contract. Interrogatories were answered, and the answer concluded with an averment that Carl H. Mayer was indebted to the appellant after giving him credit for all commissions to which he was entitled. There was a hearing of evidence before the chancellor, and the cause was referred to a master in chancery with directions to take and state an account of commissions earned by Mayer down to the date of the service of summons, and another account showing commissions earned under the contract from the service of summons to the date of filing the answer. The appellant removed the record to the Appellate Court for the First District by appeal, where the decree was affirmed and a certificate of importance and an appeal to this court were granted.

By the contract the appellant employed Carl H. Mayer to sell pianos, player pianos and player actions for one year from June 16, 1916, to June 16, 1917, in certain specified territory, and agreed to pay him five per cent on all accepted orders for merchandise sold by him direct to or received by mail from dealers whose purchasing offices were located

in that territory. The appellant was to advance \$35 per week for expenses as a drawing account, to be charged against the commissions, and Mayer was to pay his own expenses. The controversies in this court relate to the right to subject to the payment of the judgment, commissions on orders received by mail from dealers and commissions earned after the filing of the bill up to the time of the answer, which are the subject of the assignment of errors, and the right to subject to the payment of the judgment, commissions earned after the filing of the bill and answer, as to which cross-errors are assigned.

Section 49 of the Chancery act authorizes a judgment creditor, by bill in chancery, to compel a discovery of any property, money or thing in action due to the judgment debtor or held in trust for him and to subject it to the payment of his judgment. A thing in action is property distinguished from a thing of which the owner has the actual or constructive possession but for which an action may be brought to reduce it to possession. It is commonly termed a chose in action and is a personal right to demand money or property by an action; but a present right of action is not necessary, and the evidence of the right to the money or property may be a note or contract, provided it is absolute. A judgment creditor may acquire a lien on all such property by the filing of a bill in chancery and have it applied to the satisfaction of his judgment. (*Hitt v. Ormsbee*, 14 Ill. 233; *Easton v. Board of Review*, 183 id. 255.) Manifestly, a creditor can have no greater right to money or property than the debtor would have, and to constitute a thing in action there must be a fixed present right of the owner to recover the money or property in an action in his own name. (*Bonte v. Cooper*, 90 Ill. 440.) The appellee could not subject to his claim any right which Carl H. Mayer would acquire in the future. An unearned commission could not be subjected to the claim of the appel-

lee, because neither the court nor the appellee could compel Mayer to render his personal services and earn commissions for the use of the appellee. (15 Corpus Juris, 1407.)

The orders received by mail from dealers in the territory of which Carl H. Mayer had control were called repeat orders, and covered cases where Mayer solicited orders from dealers who were not in need at the time but who subsequently mailed orders to the appellant, which were regarded as attributable to the efforts of Mayer. There is no distinction between these orders and the commissions on them and orders sent direct by Mayer, and all which had been earned and which Mayer had a right to recover when the bill was filed could be subjected to the payment of the judgment.

The objection that the master was ordered to state an account from the filing of the bill and service of summons up to the time answer was filed would be an objection for Carl H. Mayer, but the appellant answered and purported to state the account down to the date of filing the answer, and being, so far as appears, indifferent as to whether it shall pay the balance, if any, to Mayer or to the appellee, and having answered down to the date of filing the answer, it cannot complain.

It follows from what has been said that commissions on repeat orders, and all other commissions earned up to the filing of the answer for which Mayer had a right of action, are proper to be stated in the account, and that commissions, if any, earned thereafter cannot be included.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(No. 12544.—Judgment affirmed.)

THE PEOPLE *ex rel.* Harry Butler *et al.* Defendants in
Error, *vs.* BEE KING, Plaintiff in Error.

Opinion filed October 27, 1919.

1. HOUSES OF ILL-FAME—*keeper of house of prostitution may be enjoined from maintaining such house within jurisdiction of court.* Under the act providing that houses of prostitution shall be declared nuisances and that the owners and the keepers of them may be enjoined from maintaining such houses, the keeper of the house may be enjoined perpetually from committing any other such nuisance within jurisdiction of the court. (Hurd's Stat. 1917, pp. 2022-24.)

2. SAME—*meaning of word "defendant," in sections 2 and 5 of act for enjoining keeping of houses of prostitution.* In sections 2 and 5 of the act for enjoining as nuisances the keeping of houses of prostitution, the word "defendant," in the provisions for perpetually restraining the defendant from maintaining such nuisance within the jurisdiction of the court, refers to the lessee or the party who is directly conducting the nuisance.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of McLean county; the Hon. SAIN WELTY, Judge, presiding.

D. J. SAMMON, for plaintiff in error.

O'CONNELL & DOLAN, for defendants in error.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

A bill was filed in the circuit court of McLean county on behalf of the People, alleging that the plaintiff in error, Bee King, was maintaining a house of prostitution, lewdness and assignation in the premises known as 509 South Gridley street, in Bloomington, and that James C. Norman, the owner of the premises, had knowledge of and consented to such use of the property. Both parties were served with summons but made no appearance and were defaulted. A

decree was entered ordering the nuisance abated and commanding the sheriff to seize the property and hold the same for a period of one year. The decree provided, also, "that the defendant Bee King be perpetually enjoined from maintaining any such nuisance within the jurisdiction of this court." Afterwards, on August 30, 1917, a petition for citation was filed in said court averring that the plaintiff in error had violated that part of the injunction above set forth in quotation marks, in that she was maintaining a house of prostitution at 416 North Main street, in said city. After hearing the evidence in support of the petition the court found her guilty of contempt in violating the injunction aforesaid and sentenced her to ninety days in jail. On appeal to the Appellate Court for the Third District the decree was affirmed. The cause comes to this court on *certiorari*.

The evidence clearly proves the violation of the injunction issued in the original decree. It is to the effect that since on or before June 15, 1917, since the rendering of the decree in the original injunction suit in which plaintiff in error was made a party defendant as lessee, she has been occupying the second and third floors of the building known as 416 North Main street, in Bloomington; that during the period of such occupancy she has used the premises, and allowed others to use the place, for lewdness, assignation and prostitution; that she is a public prostitute and keeps in her house and in her charge various girls for the purpose of prostitution; that a large number of men visit her place, both day and night; that at night obscene, vulgar and profane language is frequently used in and about the place; that large quantities of liquor are regularly delivered at the place, and that the same is now a house of prostitution and has the reputation of being a sporting house. There is no evidence that she violated the injunction with respect to the property located at 509 South Gridley street,

and no contention that she did violate the injunction in that particular.

Plaintiff in error contends that there is no evidence in the record authorizing the court to adjudge her in contempt; that the court had no jurisdiction over the person of plaintiff in error in the original injunction suit to enjoin her from committing or carrying on a public nuisance at any other place except the one named in the original suit, and that the court was without jurisdiction to punish her for contempt because of her conducting and carrying on a nuisance at 416 North Main street, in Bloomington.

Sections 1, 2 and 5 of the act under which the injunction suit was brought (Hurd's Stat. 1917, pp. 2022-2024,) provide as follows:

"Sec. 1. That all buildings and apartments, and all places, and the fixtures and movable contents thereof, used for purposes of lewdness, assignation, or prostitution, are hereby declared to be public nuisances, and may be abated as hereinafter provided. The owners, agents, and occupants of any such building, or apartment, or of any such place shall be deemed guilty of maintaining a public nuisance, and may be enjoined as hereinafter provided.

"Sec. 2. The State's attorney or any citizen of the county in which such a nuisance exists, may maintain a bill in equity, in the name of the People of the State of Illinois, perpetually to enjoin all persons from maintaining or permitting such nuisance, and to abate the same, and to enjoin the use of such building, or apartment, or such place for any purpose, for a period of one year. Upon the filing of a verified petition therefor, in any court of competent jurisdiction, the court in term time, or a judge in vacation, if satisfied that the nuisance complained of exists, shall allow a temporary writ of injunction, with bond, unless the petition is filed by the State's attorney, in such amount as the court may determine, enjoining the defendant from maintaining any such nuisance within the jurisdiction of the

court issuing such writ: *Provided*, that no such injunction shall issue, except on behalf of an owner or agent, unless it be made to appear to the satisfaction of the court that the owner or agent of such building or apartment or of such place, knew, or had been personally served with a notice signed by the petitioner, and provided that such notice has been served upon such owner or such agent of such building or apartment or place at least (least) five days prior thereto, that such building or apartment or such place, specifically describing the same, was being so used, naming the date or dates of its being so used, and that such owner or agent had failed to abate such nuisance, or that upon diligent inquiry, such owner or agent could not be found within the United States for the service of such preliminary notice. The lessee, if any, of the building or apartment, or of the place shall be made a party defendant to such petition.

"Sec. 5. If the existence of the nuisance is established, the court shall enter a decree perpetually restraining all persons from maintaining or permitting such nuisance, and from using the building or apartment, or the place in which the same is maintained for any purpose for a period of one year thereafter, unless such decree is sooner vacated, as hereinafter provided, and perpetually restraining the defendant from maintaining any such nuisance within the jurisdiction of the court. While said decree remains in effect, such building or apartment, or such place shall be in the custody of the court. An order of abatement shall also issue as a part of such decree, which order shall direct the sheriff of the county to remove from such building or apartment, or such place all fixtures and movable property used in conducting or aiding or abetting such nuisance, and to sell the same in the manner provided by law for the sale of chattels under execution, and to close such building or apartment or such place against its use for any purpose, and to keep it closed for a period of one year unless sooner released as hereinafter provided: * * * *Provided*, that

no injunction shall issue against an owner, nor shall an order be entered requiring that any building or apartment, or any place be closed or kept closed, if it appears that such owner and his agent have in good faith endeavored to prevent such nuisance. Nothing in this act contained shall authorize any relief respecting any other apartment than that in which such a nuisance exists."

The quoted words from the original decree, "that the defendant Bee King be perpetually enjoined from maintaining any such nuisance within the jurisdiction of this court," clearly mean that plaintiff in error was by that decree enjoined from maintaining any other such nuisance within the jurisdiction of the court,—i. e., from maintaining another house of prostitution, lewdness and assignation within the jurisdiction of the court. Both counsel clearly so construe those words in the decree. She did violate the injunction. That is undisputed. The court had jurisdiction of her person in that suit, and that is not disputed. The decree does not give any relief respecting any other apartment or place than the one in which the original nuisance was committed. The part of the original decree complained of is the enjoining of plaintiff in error, personally, from committing or carrying on any other such nuisance within the jurisdiction of the court. Section 5 of the act above quoted specifically gives the court the power and the jurisdiction to enjoin such a defendant, personally, from committing any other such a nuisance. This power and authority are given by the last clause of the first sentence of said section, which reads, "and perpetually restraining the defendant from maintaining any such nuisance within the jurisdiction of the court." This language clearly means that the court may perpetually restrain the defendant from maintaining any other such nuisance within the jurisdiction of the court. The second sentence of section 2 of the act above quoted clearly empowers the court, by the temporary writ of injunction, to enjoin the defendant from main-

taining any such nuisance within the jurisdiction of the court,—*i. e.*, to enjoin her from committing the original nuisance complained of and from committing any other such nuisance within the jurisdiction of the court. It is also clear that the word “defendant,” as used in said sentences of the act, refers to the lessee or the party who is directly conducting the nuisance,—*i. e.*, the house or place of lewdness, assignation or prostitution. The court therefore proceeded exactly in accordance with the provisions of the statute, and its original decree was warranted in every particular by the facts and by the statute. There is no contention or suggestion in this entire record that the act is unconstitutional or invalid for any other reason.

There is no ground for the contention of plaintiff in error that the court was without jurisdiction or authority to enter its original decree enjoining her from committing or carrying on any other such nuisance within its jurisdiction. In the enactment of said statute the legislature has recognized the fact that the offense of conducting such nuisance is one that very greatly disturbs the peace and quiet of the neighborhood in which it exists, and is such a vice as corrupts public morals and annoys private families and endangers their reputation and standing. No vice is more dangerous and more detestable to the people of a law-abiding community. No vice or public offense is more difficult to eradicate and to prevent its again recurring by the acts of the same individual after being prosecuted for committing, and enjoined from committing, the offense at a particular apartment or building. The legislature has thought it wise not only to declare such offense criminal and punishable by fine and imprisonment, but has also considered it necessary to declare by statute that such places are nuisances *per se*, and to give the people the remedy aforesaid by injunction to not only enjoin and close the premises for one year, but to also empower the court to enjoin the party who is directly carrying on such a nuisance

from conducting any other such nuisance at any other place within the jurisdiction of the court. It is wholesome legislation.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(No. 12699.—Decree affirmed.)

JOSEPH G. MUNIE *et al.* Appellants, *vs.* CERILLA GRUENEWALD, Appellee.

Opinion filed October 27, 1919.

1. *WILLS*—*testator is presumed to have intended to dispose of all his estate.* Where a person makes a will he is presumed to have intended to dispose of his entire estate, and the instrument will be so construed unless such presumption is clearly rebutted by the provisions of the will.

2. *SAME*—*when word "children" will be construed to include adopted child.* Where a testator uses the word "children" in his will he is presumed to know the law in relation to the adoption of children, and a devise over to the children of a deceased son or daughter will include a child legally adopted by his daughter, where the testator knew of such adoption and knew that the adopted child was everywhere recognized as the child of his daughter.

APPEAL from the Circuit Court of St. Clair county; the Hon. GEORGE A. CROW, Judge, presiding.

TURNER & HOLDER, for appellants.

AUGUST BARTHEL, guardian *ad litem*, (BARTHEL, FARMER & KLINGEL, of counsel,) for appellee.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

Joseph Munie died testate at his home in St. Clair county, Illinois, June 5, 1913. He was survived by Christina Munie, his widow, Joseph G. Munie, August Munie, Martha Neifind, Matilda Stolberg, Elizabeth Voellinger and

Paulina Gruenewald, his children, and Ida Arnold and Otto Munie, his grandchildren, children of a deceased son, Edward Munie. His will, dated December 6, 1910, consists of three paragraphs. By the first paragraph he directs payment of his debts and funeral expenses and by the last paragraph he appoints the executors of his will. The second paragraph,—the one which gives rise to the controversy in this case,—provides as follows:

"Second—After the payment of such funeral expenses and debts, I give, devise and bequeath all my property, of whatsoever kind, to my beloved wife, Christina Munie, she to have the use and benefit of the same during her lifetime, and after her death all of said property remaining shall be divided among all my children, share and share alike. My son Edward being dead, the share that would otherwise fall to him shall go to his children in equal shares. Should any of my other children die before my death or that of my wife, in that event the share that would fall to such child is to go to his children, among them to be divided."

Paulina Gruenewald departed this life intestate March 19, 1914, leaving no child or descendant of a child of her own body, but leaving her husband, Frank Gruenewald, and a minor child, Cerilla Gruenewald, appellee here, who had theretofore been legally adopted by Paulina Gruenewald and her husband November 16, 1903. January 5, 1916, Christina Munie, the life tenant, departed this life intestate, leaving her surviving appellee, the adopted daughter of Paulina Gruenewald, and the children and grandchildren of testator above named. At the time the will was drawn the testator knew of the adoption of appellee by his daughter, and subsequent thereto always treated her in the same manner he treated his grandchildren.

This appeal is from a decree of the circuit court of St. Clair county directing partition of certain farm lands in St. Clair county, Illinois, and a lot in the city of Belleville,

of which testator died seized, and declaring that by virtue of the second clause of testator's will the one-seventh part of his estate which would have gone to Paulina Gruenewald, his daughter, in case she had survived her mother, Christina Munie, shall pass to and become the property of Cerilla Gruenewald, the adopted daughter of Paulina Gruenewald, holding that an adopted child answers the call of child or children in said clause of the will.

Appellants contend that the devise to Paulina Gruenewald was a contingent remainder, and that upon the death of the remainder-man before termination of the particular estate the remainder never vested, but that as to this one-seventh part of his estate the testator died intestate, and the share that would have gone to Paulina Gruenewald at the testator's death vested in his heirs-at-law. They also contend that Cerilla Gruenewald, the adopted daughter of Paulina Gruenewald, does not come within the meaning of the word "children," used in the last sentence of the second clause of testator's will, but that the word "children" there used means children of the bodies of testator's children and not adopted children of any of testator's children.

From the view we take of this case it is not necessary to determine whether the devise to Paulina Gruenewald was a contingent or a vested remainder, but it is necessary to determine only whether the word "children," as used in testator's will, included this adopted child. Appellee's rights of inheritance are not material, because she is claiming nothing as an inheritance. Her claim is based solely on the will. The question presented for us to determine is: Can she be identified as a beneficiary named in the will?

In construing a will the principle to keep constantly in mind is, the testator's intention must govern. As was said by this court in *Whitcomb v. Rodman*, 156 Ill. 116, quoting Chief Justice Marshall: "The intent of the testator is the cardinal rule in the construction of wills, and if that intent can be clearly perceived and is not contrary to some

positive rule of law it must prevail, although in giving, effect to it some words should be rejected or so restrained in their application as materially to change the literal meaning of the particular sentence." This doctrine was approved in *Coon v. McNelly*, 254 Ill. 39, where we held that a devise to testator's "grandchildren" will be held to mean the grandchildren of testator's wife, where it appears that the testator left no grandchildren or children of his own but that he always referred to his wife's grandchildren as his grandchildren. And again, in *Wilson v. Wilson*, 261 Ill. 174, we held that where a testator dies leaving children and step-children, the word "heirs," used in a provision in his will that if any of his children shall die "leaving no heirs" the "legacy" of such child shall go to the testator's "living heirs," will in both instances be construed as meaning "children," particularly where the testator in previous clauses giving lands to his children has expressed his intention that the land shall remain in his family.

It is a well established rule that where a person makes a will he is presumed to have intended to dispose of his entire estate, and the instrument will be so construed unless such presumption is clearly rebutted by its provisions. Courts will adopt any reasonable construction of a will consistent with its terms, so as to give it effect to dispose of testator's entire property, rather than to hold an intention on the part of testator to die testate as to a portion of his property and intestate as to another portion. *Minkler v. Simons*, 172 Ill. 323; *Eyer v. Williamson*, 256 id. 540; *Walker v. Walker*, 283 id. 11.

Section 5 of chapter 4, Hurd's Statutes of 1917, provides: "A child so adopted shall be deemed, for the purposes of inheritance by such child, * * * the child of the parents by adoption, the same as if he had been born to them in lawful wedlock, except that he shall not be capable of taking property expressly limited to the body or bodies of the parents by adoption, nor property from

the lineal or collateral kindred of such parents by right of representation." In *Sayles v. Christie*, 187 Ill. 420, it was held that an adopted child is in the eye of the law as much the child of the parent as though it had been his natural child. In *Flannigan v. Howard*, 200 Ill. 396, we said: "An adopted child becomes the lawful child of the adopting parent for all purposes of inheritance, and is in the eyes of the law as much the child of such parent as though it had been his own child." These cases are, with many other cases of similar holding, cited with approval in *Ryan v. Foreman*, 262 Ill. 175. While this statute and these decisions are not controlling here, they are an aid in construing this will and in determining the testator's intention. The testator at the time he made his will is presumed to have known the law in relation to the adoption of children and to have made his will in view of the statute and of the interpretation placed on that statute by this court. *Walker v. Walker*, *supra*.

The testator knew of the relation existing between his daughter, Paulina Gruenewald, and her adopted child, Cerrilla Gruenewald, and knew that this adopted child was everywhere recognized as the child of his daughter. If it had been the intention of the testator to exclude this child from participating in the distribution of his estate he could easily have limited the property to the heirs of his body, or to children of the blood of his children, or to children born to his children. No such limitation was made in the testator's will and there is nothing in the will to indicate that such was his intention. He must have known that if his daughter survived his wife the remainder would vest in his daughter and would thereby pass to this adopted child as an heir of his daughter. Appellee was the adopted child of testator's daughter seven years before testator made his will and ten years before testator's death. We think it clear that the testator's conduct toward appellee during his lifetime shows that his intention was to include her in the

word "children," as used in the last sentence of the second clause of his will.

We have given careful attention to the authorities cited by appellants and have made an independent investigation of other authorities from this and other jurisdictions. In the interpretation of wills precedents are helpful servants but dangerous masters. Because one court in construing a will may have given a certain meaning to a phrase or expression in that will it does not follow that that interpretation must be approved when the will of another person is being considered by the same or another court. For instance, in *Wallace v. Noland*, 246 Ill. 535, after holding that the word "heirs," as used in the will there under consideration, meant "children," and after holding that in determining the intention of the testator in the use of language capable of more than one construction the circumstances and environment of the testator at the time of the execution of the will, including the state of the law at the time, may be considered, we held that the testator could not have there intended to include the adopted children of his son in the devise over after the death of such son without children, because at the time that will was executed and at the time the testator died there was no statute in existence, and never had been one in this State, authorizing the adoption of a child. The children were adopted twenty-three years after the death of the testator. In that case it was plain the testator could not have had in mind any children of his son except such as might be born of his body. In *Lichter v. Thiers*, 139 Wis. 481, it was held that an adopted child of testator's grand-daughter did not come within the term "children," where, at the time the will was made, the grand-daughter was a young unmarried woman and the will was made and the testator died more than ten years before the child was adopted. This holding was based on the well established rule that the will must be construed in the light of the testator's surroundings and in view of what

the testator must have had in mind at the time of expressing his testamentary wishes, the court saying: "Whether a will in favor of the children of any particular person means adopted children as well as children of the blood of such person depends upon just what the testator intended, and that may include or exclude adopted children, according to circumstances. There is no very arbitrary rule on the subject, except that the testator's intent must govern." And so in cases where other courts, in construing wills, hold that the word "children" does not include an adopted child, the reason for their holding is that the testator could not have intended the adopted child to have been so included, either because the child was adopted after testator's death or after the making of the will.

The case of *Bray v. Miles*, 23 Ind. App. 432, is very similar to the case at bar, and in a learned opinion in which the authorities are collected and discussed the court holds that an adopted child of a deceased daughter takes as a legatee, within the description "children," under a will giving property to testator's three sons and his daughter, with provision that in case of the death of either of the four the share of such deceased should go to the children of such deceased. In *In re Truman*, 27 R. I. 209, the Supreme Court held that where the testatrix recognized and treated an adopted daughter of her brother as her niece, the adopted daughter was included in the phrase, "to the children or issue" of testatrix's deceased brother, and was thereby identified as a legatee under her will.

We are of the opinion that the decree of the circuit court is in accordance with the intention of the testator, and the decree is therefore affirmed. *Decree affirmed.*

(No. 12382.—Reversed and remanded.)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, vs. THE
NORTHERN TRUST COMPANY, Exr. Appellant.

Opinion filed October 27, 1919.

1. INHERITANCE TAX—*Federal estate tax should be deducted before computing State inheritance tax.* The Federal estate tax is a charge or an expense against the estate of the decedent rather than against the shares of the legatees or the distributees, and as a part of the expense of administration this tax should be deducted before computing the State inheritance tax.

2. SAME—*when conveyance of property in trust for grantor's children is not subject to tax.* A conveyance of property to a trustee, to be held in trust for the grantor's children, is not subject to an inheritance tax, where the deeds were not made in contemplation of death and were not intended to take effect in possession or enjoyment only at or after the death of the grantor, although the right of revocation by the grantor is reserved in the deeds.

3. SAME—*transfer will be taxed where deed was manifestly intended to evade statute.* Whenever it becomes manifest that a deed was intended as an evasion of the Inheritance Tax act the State will be protected in the collection of the tax, no matter what the form of the deed may be.

4. DEEDS—*clause of revocation in conveyance in trust does not render deed testamentary.* A conveyance to a trustee for the benefit of the grantor's children, with a power of revocation in the grantor, is a proper mode of deeding property to one's children and of protecting them in its use, and the clause of revocation does not render the deed testamentary nor cause it to take effect only after the death of the grantor, but the deed takes effect at once and continues in force unless revoked by the grantor in his lifetime.

5. STATUTES—*construction of a statute adopted from another State.* Where a statute is adopted from another State or country and has been construed by the courts of that State or country the statute will be held to have been adopted with the construction so given to it, if it does not express an intention to the contrary.

APPEAL from the County Court of Cook county; the
Hon. J. J. COOKE, Judge, presiding.

FISHER, BOYDEN, KALES & BELL, (ALBERT M. KALES,
and DARRELL S. BOYD, of counsel,) for appellant.

EDWARD J. BRUNDAGE, Attorney General, and LEROY MILLNER, (WALTER K. LINCOLN, and HENRY F. HAWKINS, of counsel,) for the People.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

The Northern Trust Company, executor of the estate of Charles W. Pardridge, deceased, has appealed from a judgment of the county court of Cook county requiring appellant to pay inheritance taxes in the amount of \$31,818.20 upon the property interests disposed of by two deeds of settlement executed by Pardridge in his lifetime and a further inheritance tax of \$53,144.20 on interests disposed of by his will.

There are three questions raised by the assignment of errors on this record: (1) In computing the State inheritance tax on the value of the property passing by the will of the testator is appellant entitled to have first deducted therefrom the Federal estate tax? (2) Are the property interests disposed of by the aforesaid deeds of trust subject to an inheritance tax? (3) If the properties transferred by the deeds of trust are taxable, should they be taxed according to their value on their respective dates or as of the date of the testator's death?

It is conceded by appellee that the court erred in holding that the properties transferred by the deeds of trust should be assessed on their values at the respective dates of the deeds instead of their values at the date of the testator's death, and in the view that we have taken of this case that question need not be further considered.

The only question relative to the tax assessed on the property passing by the will of the testator is the refusal of the court to first deduct the Federal estate taxes as an expense of the estate before assessing the tax on the property passing by will. The testator died November 17, 1917. He left an estate valued by the inheritance tax appraiser

at \$2,871,151.71, which he disposed of by will. The county court, in assessing the State inheritance tax on that property, refused to deduct the Federal estate tax paid by the executor, amounting to \$316,432.40. In this ruling the court erred. The Federal estate tax is a charge or an expense against the estate of the decedent rather than against the shares of the legatees or the distributees, and as part of the expense of administration this tax should be deducted before computing the State inheritance tax. *People v. Pasfield*, 284 Ill. 450.

The two deeds in question contained substantially the same provisions, were absolute in form and were executed to the Northern Trust Company, as trustee, on May 6, 1910, and on December 18, 1911, respectively. The real estate and leasehold interests so conveyed were valued by the inheritance tax appraiser at \$2,333,333.33. Besides the tax assessed on this property, on a large balance thereof there is still left in suspense, under the judgment of the court, a State inheritance tax by reason of the fact that some of the beneficiaries cannot be ascertained until the exercise of certain powers of appointment. Trust instruments separate and apart from the deeds were executed on the respective days that the deeds were executed, and they are substantially the same in form and contain substantially the same provisions. They provide that the trustee shall take possession of the trust property, with complete power to manage, lease, care for and protect the same; to collect the rents and incomes therefrom; to pay taxes and assessments levied thereon; to repair and keep the buildings in repair and re-build the same if destroyed; to insure the same against fire and other casualties usually insured against by prudent owners in Chicago, and to have the right to institute and defend all legal proceedings affecting the same. The trustee is to hold the property in trust for the testator's four children, Edward W. Pardridge, Albert J. Pardridge, Evelyn Florence Pardridge Engalitcheff and May Aline Pard-

ridge Sargent, for their natural lives and until the death of the last survivor of them, in equal shares as tenants in common, and is to hold the share of each deceased child in trust for such person or persons as such deceased child shall by last will or testament have appointed. In default of such appointment the trustee shall hold such deceased child's share in trust for the issue of such deceased child, and if any child shall die without issue its portion shall be divided equally among the other shareholders of the trust estate. The distribution of the trust estate is to be made upon the death of the last survivor of the four children. During the lifetime of each of the four children the trustee is to pay in monthly installments the net income arising from such child's share, and from and after the death of any of said four children, and until the death of the last survivor of them, the net income arising from such deceased child's share is to be paid in monthly installments to the person or persons for whom such share is held under the terms of the trust agreements. The deeds also provide that a majority of the four children then living may at any time, by an instrument under seal delivered to the trustee, admit their brother Charles A. Pardridge as a tenant in common with them in such property, with like powers and privileges granted to him for the receiving and appointing persons to receive said property and the issues and profits thereof. His interest, however, is at no time to exceed one-fifth of the income of said trust estate, and in case he is so admitted as a beneficiary the final distribution of the property is to be made on the death of the last survivor of the five brothers and sisters, and during his lifetime the trustee is to hold the property for the benefit of the five brothers and sisters upon the same terms as provided in the original trust agreement for the original four brothers and sisters. The deeds provide for compensation to the trustee and for the appointment of the two sons Edward W. and Albert J. Pardridge, and the survivor

of them, as the agent of the trustee in the management of the trust estate, and also fix their compensation and require them to give a bond. Their powers and duties are to determine the rental to be charged for the property and to negotiate and prepare all leases for the same, to assume entire charge of affairs and make all contracts for the same, pay all taxes and assessments against the trust estate and insure the same, and to render statements of accounts of all the receipts and disbursements concerning the same. The trustee has full authority to remove said agents, or either of them, in case of neglect or misconduct or inability to discharge their duties as such. In case the trustee shall resign, the majority of the beneficiaries then entitled to share in the net income of the trust estate are given the right to name the successor of the trustee. By the terms of the trust deeds no person entitled to a share of the net income of the trust estate shall have the right to anticipate the same, nor to sell, assign, mortgage, pledge or otherwise dispose of or incumber his share in the trust estate or any part of it or the income therefrom, and no share of the trust estate, or the income arising therefrom, shall be liable for his or her debts or be subject to attachment, garnishment, execution, creditor's bill or other legal or equitable process. The trust agreements finally reserve to the settlor the right of revoking the deeds and each and every trust therein created and declared, either in whole or in part, by notice in writing to the trustee, and in case of such revocation said trust estate, or the portion thereof so revoked, shall be conveyed by the trustee to the settlor, to be held by him as his sole and absolute property and discharged from all the trusts declared in said trust agreements.

Oral testimony was offered in the county court showing clearly that the provision for the revocation of the trust agreements was inserted by the attorney who drew up the same at his own suggestion and without any instructions from the settlor with reference to the same. The testimony

further shows that the settlor exercised no further control over the property whatever after the trust agreements and conveyances were executed and received none of the income therefrom. He even declined to be consulted about the management thereof when on one occasion one of the sons sought his advice. The trustee accepted the trust and up until the settlor's death managed the property according to the provisions of the trust agreement and without consulting him with reference to the same, and the settlor never offered any suggestions as to the management of the property to anyone. About all this testimony was excluded by the court over appellant's objections. The court, however, found as facts that neither one of said trust instruments was made by the settlor in contemplation of death, and that neither one of said instruments was intended to take effect in possession or enjoyment at or after his death, and that both of said instruments were intended to, and that they actually did, take effect in possession and enjoyment on the respective dates of their execution. The court further found that the donor did not during his lifetime and subsequent to the respective dates of execution of said deeds, exercise any dominion, power or control over said property, and did not during his lifetime, by any instrument in writing or otherwise, revoke the trust deeds, or either of them, in whole or in part.

The oral evidence and the trust deeds and the trust instruments all sustain the finding of the court as to the facts, and there is no contention whatever between the parties to this record in that regard. By the written instruments the grantor or settlor intended to make a voluntary settlement of a large part of his property. The only right or power reserved in the deeds was the right of revocation. The instruments cannot be construed in any way as reserving any right in the settlor to alter or amend the trust or to add to or withdraw from the trust any portion of the

property or to exchange any portion of the property by substituting other properties for the same. The instruments give no right of control to the settlor of any of the properties conveyed or even the right to direct the management or enjoyment of the trust estate. The evidence is undisputed, also, that he never, in fact, exercised or sought to exercise any right of control, disposition or enjoyment over the property and never received a penny of the income or profits of the same. He expressed it as his wish, when consulted by one of his sons, that they and the trustee should manage and control the property and to use their own judgment, and that he did not want to be longer bothered or troubled by such affairs. The mere right of revocation would not have been written in the trust instruments had it not been suggested by his attorney, and the attorney advised it as a matter of protection of the donees in case any of them proved to be spendthrifts or otherwise incapable of protecting their own interests. This character of deed, with such a power of revocation, has long been recognized by our law as a proper mode of an ancestor deeding his property to his children and of protecting them in the use and enjoyment of the same. All well-skilled and far-seeing lawyers advising for the benefit of their clients usually suggest the insertion of such a clause of revocation, and no court, so far as we know, has ever declared that such a deed is testamentary in character or is to be held to take effect only after death, by reason, alone, of such a clause of revocation. In fact, it is not possible for such a clause to have such effect. As a matter of fact, such a deed takes effect at once and continues in full force and effect until actually revoked. If revoked, it can only be revoked during the life of the grantor, and if he does not call into effect such power of revocation during his lifetime it continues in full force and effect forever after his death. If he revokes the deed under such a power the deed becomes

a nullity and the title will be re-invested in the settlor by the deed of re-conveyance by the trustee.

The court in substance held as a proposition of law that the powers of revocation reserved to the grantor in the trust instruments were sufficient, in themselves, to cause the property passing by the deeds of trust to be taxable under section 1 of the Inheritance Tax act. So far as applicable that section provides: "A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, or of any interest therein or income therefrom, in trust or otherwise, * * * when the transfer is of property made by a resident * * * by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such a death." (Hurd's Stat. 1917, p. 2500.)

There is no contention that the deeds were made in contemplation of death. It is admitted that they were not so made. As the deeds were not intended to take effect in possession or enjoyment at or after the death of the settlor, and as this is also an admitted fact, the conveyance does not come within the statute and the property was not taxable under our Inheritance Tax law. Our Inheritance Tax law, so far as this provision is concerned, was literally copied from the New York statute. The New York court of appeals confirmed, without delivering an opinion, the appellate division of the Supreme Court in holding that the mere power reserved in a deed to revoke the same did not operate to change the effect of the deed but that the deed took effect at once and was so intended, and that the property should not have been included in an appraisal of an estate for the purpose of taxation under the New York Inheritance Tax act. (*In re Masury's Estate*, 51 N. Y. Supp. 331; affirmed by New York court of appeals in 159 N. Y. 532.) Where a statute is adopted from another State or country and the same has been construed by the court of

such State or country, it is the general rule that the statute is to be held to have been adopted with the construction so given to it, and particularly where the statute itself does not express an intention to the contrary. *People v. Carpenter*, 264 Ill. 400.

We have been referred to other New York cases, and particularly to the case of *In re Bostwick*, 160 N. Y. 489, as making a different holding from that in *In re Masury's Estate*, just cited. The *Bostwick* case does not in anywise overrule the former decision of the New York court of appeals but serves to distinguish that case from the cases later considered by that court.

The construction that we have placed upon this statute will not, in our judgment, aid parties in evading the Inheritance Tax law. Whenever it becomes manifest that a deed was intended as an evasion of the Inheritance Tax law the State will be protected in the collection of the inheritance tax, no matter what the form of the deed may be. We are entirely unwilling, however, to declare that trust deeds and trust instruments in the form in which we find those under consideration in this record render the property conveyed taxable under our Inheritance Tax act by the mere insertion of a clause of revocation so useful and so long in use for the protection of grantees in such deeds, when it so clearly appears that that was the sole intention as it does in this case.

The judgment of the county court is reversed in so far as it affects the property conveyed by the trust deed, with directions to modify the judgment affecting the property transferred by will in accordance with the views herein expressed.

Reversed and remanded, with directions.

(No. 12678.—Judgment affirmed.)

GEORGE S. MEPHAM & Co., Defendant in Error, *vs.* THE INDUSTRIAL COMMISSION *et al.*—(ALICE STEPHENS, Admx. Plaintiff in Error.)

Opinion filed October 27, 1919.

1. WORKMEN'S COMPENSATION—*burden is on claimant to prove accident arose out of and in the course of employment.* The burden is on the claimant for compensation to prove by direct and positive evidence, or by evidence from which such inference can be fairly drawn, that the accident arose out of and in the course of the employment.

2. SAME—*injury to an employee while acting as a volunteer does not arise out of the employment.* An injury to an employee while engaged in a voluntary act not accepted by or known to the employer and outside the duties for which he is employed does not arise out of his employment.

3. SAME—*who is a volunteer.* A volunteer is one who introduces himself into matters which do not concern him, by doing or undertaking to do something which he is not bound to do, which he has not been in the habit of doing with his employer's knowledge or consent, which is not in pursuance of any interest of the master, and which is undertaken in the absence of any peril requiring him to act as in an emergency.

WRIT OF ERROR to the Circuit Court of St. Clair county; the Hon. GEORGE A. CROW, Judge, presiding.

W. L. COLEY, for plaintiff in error.

GALLAGHER, KOHLSAAT & RINAKE, for defendant in error.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

This is a writ of error to review the judgment of the circuit court of St. Clair county quashing the award of the Industrial Commission awarding \$8 a week for 416 weeks to Alice Stephens, administratrix of the estate of F. C.

Stephens, deceased, the trial court having certified that the cause is one proper to be reviewed by this court.

It is stipulated that on September 12, 1917, F. C. Stephens and George S. Mephram & Co. were working subject to the terms of the Compensation act; that on said date Stephens was in the employ of the defendant in error and received an injury from which he died on the 18th of September, 1917; that defendant in error had notice of the accident; that demand for compensation was made as required by statute; that deceased left surviving him Alice Stephens, his widow, and Kimball Stephens, his sixteen-year-old son; that he was fifty-three years of age, and that during the twelve months immediately prior to the injury his average weekly wage was \$16.

Defendant in error conducted a paint factory in East St. Louis, Illinois. Deceased operated two paint mixers, known in the trade as "chasers." The two chasers operated by deceased were on the south side of the room. At the west end of the room was one known as the "A-B chaser" and at the east end of the room was one known as the "C-D chaser." They were about fifty feet apart and were driven by belts from a line shaft which ran through the room from east to west, considerably higher than a man's head. Immediately below this line shaft, and running in the same direction across the room, was a concrete walk. On the north side of the room, at the east end, opposite the C-D chaser, was another paint mixer, called a "dry chaser." It was driven by a belt running from the same main shaft. The A-B and C-D chasers were used to mix wet paint and did not require so heavy a belt as the chaser used to mix dry paint. It was the duty of deceased to attend the A-B and C-D chasers, to keep material in them and to draw off the mixture. Millwrights were employed by defendant in error to keep the belts in condition. Deceased had nothing to do with the belts and was not supposed to keep them in order. On the day of the injury he

was attending his two mixers. In passing from one to the other he walked on the concrete walk, directly under the line shaft. The belt running from the line shaft to the dry mixer broke. It was repaired by the millwright, and the foreman, Jacob Tipton, called August Roberts, the workman who had charge of the dry mixer, and another workman, Chauncey Tipton, to assist him in putting the belt back on the pulley. The foreman stood upon a platform above the heads of these two workmen so that he could handle the belt on the line shaft. When they got the belt on the pulley it was found that there was a half-turn in the belt, and the foreman directed Roberts to get a piece of gas pipe and throw the belt off. Roberts got the pipe, and he and Tipton put it against the belt above their heads and tried to push the belt off but did not succeed. At this instant the deceased, walking from his A-B chaser toward his C-D chaser, approached these men and saw that they were having difficulty in getting the belt off. He walked up to Roberts and took the pipe out of his hand, saying, "Give me that pipe and I will show you how to get that belt off." As soon as the foreman saw what he was about, he shouted to him, "Don't do that!" but deceased had gone too far. The belt jerked the pipe into the pulley and deceased was raised off his feet and thrown to the floor. His skull was crushed and he was knocked unconscious. It was from this injury that he died.

All the evidence in the record was offered by the administratrix. It is the testimony of the fellow-employees of deceased. The whole incident happened much quicker than it can be told, and so the testimony is very brief. The foreman testified that when deceased took the pipe out of Roberts' hand and made the remark that he would show them how to get the belt off he did not realize for a moment what deceased was going to do, but that as soon as he did he told him not to do it; that deceased put the pipe against the edge of the pulley on the main shaft to throw

the belt off, and the pipe caught, whirled him around and struck him; that he was standing on the platform, near deceased; that all was done so quickly that he did not have time to know whether anyone was hurt or who was hurt until he had come down from the platform, when he saw deceased lying on the floor. He further testified that when the belts came off their pulleys the foreman or the millwright replaced them, and if help was needed they called on some one of the workmen to assist; that the workmen never adjusted the belts without being told to do so by the foreman; that deceased never helped with the belts, and that he did not call on deceased to help put on these heavy belts because deceased was too old; that the belt which was being repaired was not the one that operated either chaser of which deceased had charge but was the belt that drove the dry chaser, which was in charge of Roberts.

August Roberts testified that he saw the occurrence just as the foreman described it; that deceased came up to him and took the rod out of his hand and said, "Let me have that rod; I will throw it off;" that no one had asked him to help but that he volunteered; that no one ever helped on that belt unless told to do so by the foreman.

John Nelson, who worked in the same room, testified that he saw deceased take the pipe out of Roberts' hand and put it against the belt; that the belt drove the pipe against the pulley, and that the foreman, who was on the platform, shouted to him not to do that; that the belt jerked the rod under the pulley and the rod jerked deceased up, and he fell on the floor. He further testified that when the belts came off the foreman or the millwright put them on, and that when they had difficulty with the belt they called whomever they wanted to help with the belt; that he had helped put belts on when ordered to do so; that he had seen deceased help with the belts when so ordered; that in this instance he did not hear deceased ordered to help with the belt, but that when deceased took the rod and started to pry the belt

off, he heard the foreman cry out, "Don't! Don't!" He indicated the short time in which the accident happened by crossing his hands twice and saying, "It was just like doing this way and that way." He further testified that the taking of the rod by the deceased and the placing of it in the belt seemed to happen almost at the same time.

There is no difficulty in determining the facts in connection with this injury, but the difficulty presented is in applying the established principles of law laid down in cases of this character to the facts so determined. Counsel for defendant in error have cited no authorities in support of their contentions and have rendered no assistance to the court in determining legal questions here presented. *Gillespie v. Rout*, 40 Ill. 58.

It is conceded that this death was accidental, but the question is, does the proof tend to show that the death occurred while deceased was reasonably fulfilling the duties of his employment or engaged in doing something incidental to it? The burden is on the applicant to prove that the accident arose in the course of and out of the employment by direct and positive evidence or by evidence by which such inference can be fairly drawn. (*Wisconsin Steel Co. v. Industrial Com.* 288 Ill. 206.) The adjudicated cases, American and English, so far as we are informed, universally hold that an injury to an employee while engaged in a voluntary act not accepted by or known to the employer and outside the duties for which he is employed cannot be said to arise out of his employment. *Central Garage v. Industrial Com.* 286 Ill. 291.

Counsel for plaintiff in error relies on *Alexander v. Industrial Board*, 281 Ill. 201, and *Mueller Construction Co. v. Industrial Board*, 283 id. 148. These cases are clearly distinguishable from the one at bar. In the *Alexander case* the workman was employed by a private contractor to unload stone from cars on a team track near elevated railroad tracks, and was invited by the yardmaster of the railroad

company to enter on the tracks and board a slowly moving cut of cars in order to get tools and work clothing out of a car where the workman had left them the night before, on leaving the car partially unloaded. While crossing the tracks he was killed by an express train. There the injury was held to arise out of the employment because it was customary for the workmen to leave tools in partially unloaded cars and to recover them in case the cars were moved during the night, where it was necessary to make use of the tools in unloading stone from other cars. In the *Mueller case* a carpenter foreman was struck and injured by an automobile while crossing a street for the purpose of using a telephone. It was part of his duty as foreman to order materials for the day's work, and because there was no telephone in the building where he was employed it was necessary for him to use a telephone across the street. It was there held that he was injured in the course of his employment and that the injury arose out his employment. In the instant case deceased was neither required nor expected to assist in adjusting this belt. The foreman had called two men to help and it is apparent no more were needed. It was merely a question of time until the belt would have been adjusted. There was no emergency. The condition of that belt did not affect the part of the work which deceased was employed to do. Deceased here volunteered his services, and before his foreman could command him not to perform the service he had placed himself in such a position that he could not save himself from the injury. A volunteer is one who introduces himself into matters which do not concern him and does or undertakes to do something which he is not bound to do, which he has not been in the habit of doing with his employer's knowledge or consent, or which is not in pursuance of any interest of the master and which is undertaken in the absence of any peril requiring him to act as on an emergency. This case is controlled by our holding in *Dietzen Co. v. Industrial Board*,

279 Ill. 11. We there reviewed at length cases on this subject, and reference is had to our discussion of those cases for further reasons for our holding in this case. The principles there announced are further discussed and approved in *Central Garage v. Industrial Com. supra*, and *Nelson Construction Co. v. Industrial Com.* 286 Ill. 632.

As it appears from the testimony of the fellow-employees of deceased that deceased was volunteering his services and was of his own volition intermeddling with something entirely outside the work for which he was employed, the judgment of the circuit court must be and is affirmed.

Judgment affirmed.

(No. 12730.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in
Error, vs. PRUDENCIO LAURES, Plaintiff in Error.

Opinion filed October 27, 1919.

1. CRIMINAL LAW—*when judgment of conviction will not be reversed on evidence.* It is only where the court is able to say, from a careful consideration of the whole of the testimony, that there is a well founded doubt of the guilt of the accused, that the Supreme Court will interfere on the ground that the evidence does not support the verdict.

2. SAME—*when case will not be reversed because of inexperience of counsel for defendant.* Where the defendant is unable to employ his own counsel and the court appoints two attorneys for the defense while the State's attorney is unassisted in the prosecution, a judgment of conviction will not be reversed because of the inexperience of the counsel for the defense, where there was ample time to prepare for the trial and there is nothing in the record with reference to the experience of counsel for the defense in criminal trials. (*People v. Blevins*, 251 Ill. 381, distinguished.)

3. SAME—*what evidence is proper to show motive in homicide.* Evidence of jealousy and unrequited love, and the facts on which it rests, is relevant for the purpose of showing motive in homicide.

4. SAME—*when evidence as to meaning of foreign words used by defendant is proper.* Where there is a dispute in a murder trial over the proper translation by the interpreter of foreign words used

by the defendant in making a threat or in talking about the deceased, the court may permit other testimony with reference to the meaning of the words by witnesses who are familiar with the language used, so as to obtain a proper interpretation. (*Schnier v. People*, 23 Ill. 11, followed.)

5. SAME—*when evidence of another distinct offense is competent.* The test of relevancy is the connection of the facts proved with the offense charged, and whatever testimony tends directly to show the defendant guilty of the crime charged is competent, although it also tends to show him guilty of another offense.

6. SAME—*one instruction may refer to another.* Instructions should be considered as a series, and it is not improper to refer in one instruction to another.

7. SAME—*instruction quoting sections 148 and 149 of Criminal Code correctly states law of self-defense.* An instruction quoting sections 148 and 149 of the Criminal Code, fairly connected, correctly states the law of self-defense and is not misleading.

8. SAME—*when new trial will not be granted for newly discovered evidence.* The granting of a motion for a new trial on newly discovered evidence rests largely in the discretion of the trial court, and the motion will not be granted for the purpose of admitting inconclusive, cumulative or impeaching testimony, especially where there has been a lack of proper diligence to procure the evidence on the trial.

WRIT OF ERROR to the Circuit Court of Bureau county;
the Hon. JOE A. DAVIS, Judge, presiding.

WALTER A. PANNECK, for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, JOSEF T. SKINNER, State's Attorney, and FLOYD E. BRITTON, (J. L. SPAULDING, of counsel,) for the People.

Mr. JUSTICE CARTER delivered the opinion of the court:

About one o'clock on Christmas morning, December 25, 1918, plaintiff in error, Prudencio Laures, shot and killed Celestino Blanco in the home of Celedonio Menendez, at DePue, in Bureau county, Illinois. He was tried in the circuit court of that county, the jury finding him guilty of murder. After the motion for a new trial and in arrest of

judgment was overruled he was sentenced to be hanged on April 11, 1919. The writ of error was thereafter made a *supersedeas* by one of the judges of this court in vacation, and the case is now here for review.

The evidence shows that the deceased, Blanco, and plaintiff in error, were acquainted in Spain; that plaintiff in error was the first of the two to come and live at the village of DePue and that some time thereafter Blanco came to the same place; that both men were employed at the zinc works located there, plaintiff in error living in the eastern part of the village, in what is known as the White City, while the deceased lived about a mile westerly from plaintiff in error. The evidence tends to show that in March or April, 1918, there arrived in the village Josephine Alvarez, coming from Cuba; that plaintiff in error had sent money to apply on her transportation from Cuba to this country and she came to DePue under the impression that she was to marry him; that they lived together about two months in White City; that then they separated and she went to the western part of DePue, where she started a boarding house and had among her boarders for a time the deceased; that he lived at her boarding house until some time in September, 1918; that during the time Josephine Alvarez kept the boarding house plaintiff in error visited her at various times and some conversation was had between them with reference to her quitting the boarding house and leaving the village, but she refused to leave DePue. The evidence also tends to show that plaintiff in error claimed that he left a wife in Spain because she was going with certain men and that the deceased was one of these men; that he said to several people during the time Josephine Alvarez was living in DePue that unless the deceased kept away from her there would be trouble, or words to that effect; that he made this statement as late as two weeks before the shooting, although there is no evidence in the record showing definitely that the deceased had anything

to do with the Alvirez woman after he left her boarding house in September before the shooting. There is no evidence indicating that during the time that both men lived in the village, up to the night of the shooting, there had been open trouble of any kind between them. The building in which the shooting occurred is a two-story frame structure, facing north, on the south side of Marquette street, which there runs east and west. There was an ordinary entrance near the center of the front of the building, which led to a short hallway, upon the west side of which, about two feet south of the front entrance, was a door that led into a kitchen. The kitchen faced Marquette street. South of and immediately back of it was the dining room, and east of the dining room was what is known as the coal room. The only entrance to the dining room from the front part of the building was a door at the northwest corner of the dining room and the southwest corner of the kitchen. The dining room contained a heating stove standing in the northeast corner, a table about three feet in width, back of the table a bench five feet in length which was used by the boarders to sit on for their meals at the table, and there were four or five chairs in the room that night on three sides of the table, the bench being between the table and the west wall of the dining room. The coal room to the east of the dining room does not appear to have been used for any purpose in the winter except to store coal, having an entrance into it from the porch at the rear of the building and also from near the southeast corner of the dining room.

The testimony shows that there is a custom among the Spanish people on Christmas eve to congregate at some home to celebrate the coming of Christmas; that on Christmas eve, December 24, 1918, Celestino (called Celo) Menendez, the occupant of the building described herein, had such a gathering at his home, to which he invited some of his Spanish friends, including plaintiff in error, but did not

invite deceased. Plaintiff in error reached the house about 8:30 in the evening. The deceased and two friends, Rodriguez and Gonzales, arrived at the house about ten o'clock and were admitted by the wife of Menendez. They went through the kitchen into the dining room. Plaintiff in error was then in the dining room. The evidence tends to show that deceased sat down by him on the bench and that after their arrival all present took a bottle of beer apiece; that they drank beer, ate cake, played cards and told stories and were all enjoying themselves, each according to his own fashion; that plaintiff in error and deceased joined in the telling of stories, although they did not speak to each other; that they were all there together until between twelve and one o'clock; that during that time plaintiff in error left the dining room, going out to a porch at the rear of the house through the coal room; that when he came back deceased was occupying the seat that he had left, so he took a seat across the table; that many of the men wore their overcoats while in the room, although some of them removed their hats; that not long after twelve o'clock the deceased suggested that he and his two companions go home. Plaintiff in error testified that about that time he left the dining room and entered the kitchen, starting for home, and was walking towards the door leading to the hallway; that as he got near the door deceased came up to him and said, "I will kill you," and took hold of him by the clothing and started to push him toward the dining room, and as plaintiff in error was trying to turn around the deceased attempted to throw him on the ground and choke him, saying, "You son of a bitch! I will kill you!" that during this struggle he shot several times at the deceased; that they continued struggling through the door into the dining room, and overturned the stove there; that deceased threw him to the floor in the dining room.

The testimony agrees that deceased was shot at least twice, one of the wounds being fatal and the other being a

flesh wound. There is some testimony that he was shot three times, the third wound being a mere flesh wound, and there is also some testimony tending to show that there were four shots fired. We think the weight of the testimony tends to show that the fatal shot was fired in the kitchen and not after the parties reached the dining room. After the stove was overturned the proprietor, Menendez, interfered and separated the two men while they were struggling. Plaintiff in error left at once and went home. The deceased was helped to his feet and placed on a bed but lived less than hour. Only two of the witnesses claimed to have seen any of the struggle that took place in the kitchen. These were Rodriquez and Gonzales, who came with deceased to the place, and it is quite clear from their testimony that they did not see the beginning of the struggle and were unable to tell definitely all that took place during the struggle in the kitchen. It is not claimed, and there is no testimony, that the deceased was armed in any way, with a pistol or otherwise. Three bullet holes were found in the walls of the kitchen, and it is apparent from these, assuming, as we must, that the shots were all fired by plaintiff in error, that during the struggle in the kitchen the two men changed sides. The weight of the testimony is to the effect that the shooting occurred very shortly after deceased entered the kitchen, some of the testimony being to the effect that it was two or three minutes after plaintiff in error entered the kitchen. We think it is manifest from reading the testimony of all these witnesses that none of them were absolutely certain as to just how long it was after either the deceased or plaintiff in error left the dining room before the shooting took place. It is evident that it was a very brief period.

We find considerable discussion in the briefs as to the size of the rooms and the different articles in the kitchen and dining room, but we do not think the size of these rooms and articles had any material bearing on the issues,

except in so far as the location and size of the doorways might have some bearing on the testimony of Gonzales and Rodriquez as to what they saw of the struggle in the kitchen.

The theory of the State on the trial was, and now is, that plaintiff in error went to the kitchen first to lie in wait, as it were, for Blanco when he came through and that the assault he made upon deceased was premeditated. The theory of counsel for plaintiff in error on the trial was, and the theory of his present counsel now is, that the deceased was the aggressor in the beginning of the trouble and continued the aggressor during the whole struggle until he received his fatal wound; that plaintiff in error was justified in shooting in self-defense.

Counsel for plaintiff in error argues earnestly and at length that the evidence in the record does not justify the conviction, and that the case should be reversed for that cause if for no other. Taking into consideration that part of the evidence which is conceded to have been properly introduced, we can reach no other conclusion than that the question whether the homicide was committed as an act of self-defense by plaintiff in error or whether the act was premeditated and justified the verdict is peculiarly a question for the jury. This court is reluctant to substitute its opinion for that of the jury upon controverted questions of fact. It is only where the court is able to say, from a careful consideration of the whole of the testimony, that there is clearly a reasonable and well founded doubt of the guilt of the accused, that it will interfere on the ground that the evidence does not support the verdict. (*Gainey v. People*, 97 Ill. 270; *People v. Grosenheider*, 266 id. 324.) We cannot say from an examination of this record that the verdict in the case at bar is manifestly erroneous or that the finding of the jury is obviously contrary to the decided weight of the testimony. Unless there is some material error of law in the record, therefore, which would injuri-

ously affect the issues against plaintiff in error, we would not feel justified in interfering with the verdict.

Counsel for plaintiff in error is not the same counsel who appeared for him in the trial of the case in the circuit court. It is most strenuously argued by the present counsel that counsel who appeared for plaintiff in error in the trial court were so inexperienced in the trial of criminal cases that plaintiff in error on that account did not receive a fair trial. It appears from the record that plaintiff in error was unable to employ or failed in employing counsel to appear for him, and the court appointed two attorneys, R. L. Russell and H. R. Brown, to represent his interests in the trial court. There is nothing in the record with reference to their experience in criminal trials. It is stated by present counsel in his brief that attorney Russell was the post-master at Princeton and was obliged to devote at least eight hours a day to the performance of the duties of that office and therefore could give very little attention to preparation for the trial of this case, and that attorney Brown had had a very limited experience in the trial of criminal cases. He also insists that the record shows conclusively that by their mismanagement of the trial and by their bringing in evidence which was immaterial and prejudicial to plaintiff in error, and allowing the admission, without objection, of other improper evidence, they clearly proved themselves incompetent, and that under the reasoning of this court in *People v. Blevins*, 251 Ill. 381, it was the duty of the trial court to interfere when they were bringing out improper evidence, in order to protect the interests of plaintiff in error, or that a new trial, under the reasoning in the case just cited, should be granted for that cause alone. We have compared, so far as possible, the evidence bearing on this question as found in the *Blevins case*, *supra*, with the evidence found in this case, and we find the situation on the question of inexperienced attorneys and the reason for there being error in that regard in the *Blevins case* very differ-

ent from what it is here. In the *Blevins case* the record shows that there were three experienced attorneys prosecuting, two of them employed by private parties; that the counsel there appointed by the court to defend the accused were only appointed two days before the trial opened, and that they made a motion for a continuance in order to make preparation of the case, which was overruled. In the case at bar, so far as the record shows, there was ample time to prepare for the trial and counsel for plaintiff in error were not overmatched in experience by the counsel for the State. The State's attorney, himself a comparatively young man, prosecuted the case alone, while two lawyers, one of whom had, apparently, had more years of experience, defended and looked after the interests of accused. While it is true that counsel for plaintiff in error did draw out some evidence from the witnesses with reference to the relations of plaintiff in error and the deceased before the shooting that it is now claimed by present counsel was improper, we are of the opinion that this evidence could have been properly introduced by the State as against plaintiff in error. This matter we will discuss later in the opinion. This question, and other questions as to whether certain evidence was improperly admitted through the incompetency and inexperience of counsel for plaintiff in error or could have injuriously affected plaintiff in error, are questions upon which there might be a difference of judgment by the best trial lawyers. It is manifest that no two cases are exactly alike on the question of the employment of private counsel to prosecute or the competency or incompetency of the lawyers for the accused. Each case must in a large measure be decided on its own special facts. In the *Blevins case* this court did not reverse solely because of the incompetency of the counsel for the accused. While the court did say that under the circumstances there shown the trial court had not properly protected the interests of the defendant, we think it is clear that that was only one of the causes,

and not the principal one, that moved this court to reverse the case. We are of the opinion that this record does not show any such incompetency of counsel for plaintiff in error as to justify the court in reversing the case or to lead to the necessary conclusion that plaintiff in error's interests were injuriously affected by the incompetency and inexperience of his counsel.

Counsel for plaintiff in error argues at length that the evidence as to the relations of plaintiff in error with the deceased, and the fact that plaintiff in error bore ill-will to the deceased because he thought Blanco had had improper relations with his wife in Spain years before and because he thought Blanco was having improper association with the Alvarez woman in DePue, was so incompetent that the court should have refused to admit it, even though it was originally brought out by the inquiries of counsel for plaintiff in error. With this we cannot agree. It is always relevant to put in evidence of jealousy and unrequited love, and the facts on which they rest, for the purpose of showing motive in homicide. (2 Wharton on Crim. Evidence,—10th ed.—1544, 1693; 21 Cyc. 919.) Counsel for plaintiff in error insists that this evidence is incompetent because it happened so long before the shooting; that the alleged relations of Blanco with plaintiff in error's wife were years before, and the evidence shows that Blanco had not had anything to do with Josephine Alvarez for two or three months before the shooting, and that therefore the shooting could not have been caused by the jealousy of plaintiff in error, and that his threats were that if Blanco did not leave the woman alone he would make trouble; that Blanco had left the woman alone for several months, and therefore there was no reason for plaintiff in error to be jealous of him. The evidence of Mrs. Menendez, the wife of the proprietor of the house where the shooting occurred, was to the effect that plaintiff in error had said to her that he had seen the deceased in a saloon some two weeks before the

shooting, and that if the deceased did not leave the Alvarez woman alone there would be trouble. It is therefore quite evident that plaintiff in error retained the jealous feeling up to a brief time before the shooting. The evidence of the belief of plaintiff in error as to the relations of deceased with his wife and as to the more recent relations with Josephine Alvarez that he believed to exist, even if without foundation, we think was proper to show motive, and the fact that the relations with the wife had been years before would naturally add to the feeling of plaintiff in error with reference to the deceased in the action he believed Blanco was taking with reference to the woman he (plaintiff in error) might marry. Under the reasoning of the authorities already cited, and of *Everett v. State*, 62 Ga. 65, *Marler v. State*, 68 Ala. 580, *Templeton v. People*, 27 Mich. 500, *State v. Lawlor*, 28 Minn. 216, and *McCue v. Commonwealth*, 78 Pa. St. 185, there was no error in admitting this evidence.

We cannot agree with the argument of counsel for plaintiff in error that there was no evidence in this case to warrant the argument of counsel for the State that plaintiff in error shot and killed Blanco from motives of jealousy.

In this connection it is also argued by counsel for plaintiff in error that the trial court erred in admitting testimony with reference to the meaning of certain Spanish words which it was claimed plaintiff in error had used in talking about the deceased; that the testimony of one Leon was to the effect that in the month of May before the shooting witness had a talk with plaintiff in error, and he told the witness that Blanco was living with Josephine Alvarez and that Blanco was the cause why he was not living with the woman, and that he had to buy a revolver "to take him from sight." The dispute is over the proper translation of the Spanish words which were translated by the interpreter to mean "to take from sight." It appears that most of the witnesses were Spanish and could not talk

English and that an interpreter was required; that plaintiff in error talks English very poorly; that an interpreter named Pina was employed, who interpreted for both sides. The record shows that for some reason another interpreter, named Lorenzo, who the bill of exceptions states was well qualified to interpret the Spanish into English and the English into Spanish, was appointed to act as interpreter exclusively for plaintiff in error's counsel during the entire preparation of all the evidence therein and throughout the entire trial. The record does not show that Lorenzo took any active part in the trial of the case, although it does appear that he, by suggestion or otherwise, helped to examine at least one witness. The regular interpreter said that the words Leon testified were used were "quitar de lantre;" that these words mean "to take from sight," or "to kill." Another witness, Marie Blanco, who testified that she understood English and Spanish, testified that those words meant "to kill somebody;" that when used with this last meaning the words were considered in Spanish a slang expression; that when used with the ordinary meaning they meant "to get or take out of sight." On the motion for a new trial an affidavit by Tristan Melendreras was filed on behalf of plaintiff in error, stating that he was employed as secretary at the Spanish consulate in Chicago; that he had been holding this position for over two years, preparing legal documents for the consulate and in charge of the Spanish correspondence; that the words "quitor de lantre" have no meaning in the Spanish language; that the man who used words of similar sound must have said "quitar de delante," which means in idiomatic English, "Get out of my way," or "Go away from me;" that the Spanish for "to kill somebody" is "matar a alguien." It is argued by counsel for plaintiff in error that the admission of these words and their translation in the trial court were most injurious to plaintiff in error.

This court, in discussing the object of interpretation and the manner in which an interpreter should translate, said in *Schnier v. People*, 23 Ill. 11, on page 22, that the object of all evidence is to inform the jury or tribunal to whom the issue is submitted, of all the facts in dispute, precisely as they occurred. The nearer that tribunal can, through the aid of evidence, become eye and ear-witness of the transaction the nearer will it be enabled to do strict justice between the parties; that to properly interpret, it is always desirable that the witness shall, as far as possible, detail to the jury the very same language, in precisely the same connection in which it was employed by the person using it, otherwise it will necessarily be merely an accident if the jury obtain the sense in which it was spoken; that when an interpreter is employed "it is his duty to translate the evidence given by the witness into equivalent terms of the language employed by the tribunal trying the cause. All persons are aware of the fact that the power to make a literal translation from one language to another, so as to preserve in the translation the precise meaning of the original, depends upon an accurate knowledge of both languages by the translator. This being the office of an interpreter, if the person employed is not well versed in each language he is liable to fail in giving the jury the facts, circumstances, conversations and admissions just as they were detailed by the witness, and if that is not done the party against whom the mistake is made must suffer wrong unless he shall be permitted to call others who are more capable of translating the language accurately." We agree fully with the reasoning of this opinion on this question. So far as we can ascertain, every opportunity was given plaintiff in error and his counsel to have a proper interpretation of the disputed words during the trial. We cannot say, even in the light of all the evidence in the record, that plaintiff in error was injuriously affected by an improper translation of the disputed words. We think it is evident

from the testimony of the witness Leon that plaintiff in error, regardless of the meaning of the Spanish words used, was making serious threats against the deceased. Furthermore, there were several other witnesses who testified to threats of as serious a character where the meaning of words not given in Spanish is not questioned, so that, even if the witness Leon misinterpreted or misunderstood the Spanish words used, we cannot see how it seriously affected the material issues in the case prejudicially to the plaintiff in error. We find nothing in this record that justifies the criticisms of present counsel for plaintiff in error that the judge acted improperly with reference to the interpreters who were employed during the trial of the case. Indeed, we are disposed to think that the record shows he took extra precautions to protect the interests of plaintiff in error. We find nothing in the record to show that either of the interpreters employed during the trial was incompetent to act in that capacity.

Along with other alleged improper rulings of the court as to the admission of testimony, counsel for plaintiff in error complains that the court improperly admitted evidence as to his client's relations with the Alvarez woman and the fact that he lived with her in an open state of adultery. Under the authorities already cited we think this evidence was properly admitted in order to show the relations between deceased and plaintiff in error and that plaintiff in error had a motive for shooting Blanco. The test of admissibility is the connection of the facts proved with the offense charged, and whatever testimony tends directly to show the defendant guilty of the crime charged is competent, although it also tends to show him guilty of another and distinct offense. *People v. Moeller*, 260 Ill. 375; *People v. Jennings*, 252 id. 534.

Counsel for plaintiff in error argues that serious prejudicial error was committed by the trial court in the giving of instructions. He first complains of instruction 14 because it instructs the jury that if they believe, beyond a rea-

sonable doubt, that plaintiff in error killed the deceased in manner and form as charged in the indictment, "not in self-defense as defined in these instructions," etc. The objection seems to be mainly to the words just quoted, and if we understand the argument it is that the doctrine of self-defense was not correctly defined in the other instructions. If it was correctly defined in the other instructions then there certainly can be no valid objection to instruction 14. It needs no citation of authorities to make clear that this court has always held that instructions should be considered as a series and that it is not improper to refer in one instruction to another.

The principal objection to the instructions concerning self-defense is to instruction 15. This instruction is an exact copy of sections 148 and 149 of the Criminal Code. It is complained that this instruction eliminates the question whether the danger was actual or only apparent. While it has been sometimes said the giving of an instruction containing one of these sections alone might be misleading as relating to the doctrine of self-defense, this court has frequently held that the giving of an instruction containing these two sections, fairly connected, stated the law of self-defense and was not misleading. (*Gainey v. People*, *supra*; *Kinney v. People*, 108 Ill. 519; *McCoy v. People*, 175 id. 224; *Kipley v. People*, 215 id. 358; *Parsons v. People*, 218 id. 386; *People v. Simpson*, 270 id. 540.) Counsel for plaintiff in error concedes that the court has so held in those cases but argues that this case should be distinguished; that in at least some of those cases, notably *People v. Simpson*, *supra*, the instruction containing these sections of the Criminal Code was given in connection with other instructions which clearly advised the jury under what circumstances a reasonable person would have reasonable ground to believe that he was in danger of losing his life or suffering great bodily harm and that men threatened with danger were obliged to judge from appearances. Instruction 24 given

in this case stated the doctrine of self-defense as fully and strongly as that doctrine has been stated in *Campbell v. People*, 16 Ill. 17, and in a long line of decisions of this court approving that doctrine, as late as *People v. Scott*, 284 Ill. 465. Counsel for plaintiff in error attempts to distinguish this case from the others by stating that it seems that in *People v. Simpson*, *supra*, and other cases, more than one instruction was given which stated correctly the doctrine of self-defense, while in this case there was only one such instruction. We do not think the cases can be distinguished on that ground. This court has more than once stated that to give one instruction on a certain subject, clearly stating the law, was often better practice than to give several instructions stating in varying terms the law on that one topic; that several instructions on the same subject might tend to mislead rather than assist the jury in reaching a correct conclusion. In view of the series of instructions given in this case and the entire record before us, we do not think the trial court committed error in giving instruction 15 here complained of.

Counsel for plaintiff in error also objects to the giving of instruction 17, in which it was stated that the right of self-defense did not imply the right to attack in the first instance, he arguing that there was no evidence to warrant the giving of this instruction or in any way justifying the jury in believing that plaintiff in error was the attacking party in the struggle. Several witnesses swore to threats having been made by plaintiff in error against the deceased, caused by his belief that Blanco was giving attentions to Josephine Alvarez. There is also evidence in the record which tends to sustain the argument that plaintiff in error preceded Blanco into the kitchen and there lay in wait for him, and that as soon as Blanco came from the dining room into the kitchen began shooting at him. While the evidence is not in absolute accord as to the length of time after Blanco went into the kitchen before the shooting began, all

of it is to the effect that the first shot was fired very shortly after Blanco went into the kitchen, and there is evidence tending to show that there was no noise or loud conversation or quarreling between plaintiff in error and Blanco before the shooting began. Reading the seventeenth instruction as a part of the series we do not think it was possible for the jury to have been misled prejudicially to the interests of plaintiff in error by its being given.

On the motion for new trial several affidavits were filed which it is contended by counsel for plaintiff in error required the granting of such motion. One of the principal affidavits relied on by counsel is that of Tristan Melendreras, secretary of the Spanish consulate in Chicago, already referred to. Most of the other affidavits referred to evidence that was merely cumulative with reference to the conditions existing in the dining room at the time and shortly before the shooting and as to the time which elapsed after deceased left the dining room before the shots were fired. Some of the affidavits were impeaching in their character as to certain of the witnesses who testified during the trial. It is a familiar doctrine that a new trial will not be granted merely for the purpose of admitting inconclusive, cumulative testimony or impeaching testimony, especially where there has been a lack of proper diligence to procure the evidence on the trial. (*Friedberg v. People*, 102 Ill. 160; *Grady v. People*, 125 id. 122; *Harter v. People*, 204 id. 158; *People v. McCullough*, 210 id. 488; *People v. Wright*, 287 id. 580.) The law is also that the granting of a motion for new trial on newly discovered evidence rests largely in the sound discretion of the trial court. (16 Corpus Juris, 1205; 1 Bishop's New Crim. Proc. sec. 1274.) We do not think the record shows due diligence in obtaining the newly discovered evidence set forth in some of these affidavits. Several of the affidavits were made by witnesses who testified at length at the trial, and, of course, there was every opportunity then for obtaining a full knowledge as to all

that such witnesses knew with reference to the material issues. Applications for new trial on the ground of newly discovered evidence are not looked upon with favor by the courts, "and in order to prevent, so far as possible, fraud and imposition which defeated parties may be tempted to practice as a last resort to escape the consequence of an adverse verdict, such applications should always be subjected to the closest scrutiny by the court, and the burden is upon the applicant to rebut the presumption that the verdict is correct and that there has been a lack of due diligence. The matter is largely discretionary with the trial court, and the exercise of its discretion will not be disturbed except in a case of manifest abuse." (20 R. C. L. 289, 290.) Under the circumstances here appearing in this record, some of these affidavits as to newly discovered evidence come obviously within the rule just referred to and should be subjected to the closest scrutiny, in order that the court might not be misled by parties who might be attempting to practice fraud or imposition upon the court in order to enable plaintiff in error to escape the consequences of an adverse verdict. We cannot say, on this record, that it has been affirmatively shown that due diligence was used by plaintiff in error or his counsel to ascertain, search out and find the evidence offered in the affidavits, neither do we feel sure that if such evidence had been procured and presented to the jury a different verdict would have been reached.

We find no reversible error in the record. The judgment of the circuit court will therefore be affirmed. The clerk of this court is directed to enter an order fixing the period between nine o'clock in the forenoon and five o'clock in the afternoon of the twelfth day of December, 1919, as the time when the original sentence of death entered in the circuit court of Bureau county shall be executed. A certified copy of that order will be furnished by the clerk to the sheriff of Bureau county.

Judgment affirmed.

(No. 12789.—Decree affirmed.)

WILLIAM M. FLEMMING, Defendant in Error, vs. GEORGE C. TALLERDAY, Plaintiff in Error.

Opinion filed October 27, 1919.

1. JUDICIAL SALES—*inadequacy of price, together with other irregularities, may justify relief against sale on execution.* Inadequacy of price, alone, where a sale on execution has been regularly conducted, may not afford ground for equitable relief, but where there are additional circumstances or irregularities in the sale, such additional circumstances, together with gross inadequacy of price, may justify relief in a court of equity.

2. SAME—*attorney for purchaser cannot testify from recollection how property was sold.* In a suit to set aside a sheriff's deed on the ground that the property was sold *en masse* for an inadequate price the sheriff's return is the best evidence of the manner of conducting the sale, and the attorney for the purchaser should not be allowed to testify from his recollection whether the property was offered in separate tracts.

3. SAME—*when land levied on by sheriff should be offered for sale in separate tracts.* Where land levied on under an execution consists of several tracts it is the duty of the sheriff to offer it for sale in separate tracts, and if one tract will not sell separately to add another tract to it, and then a third if no bid is had for the two, and so on until it is all offered *en masse*.

4. SAME—*when judgment debtor is not estopped to set up inadequacy of price and irregularity of sale.* The conduct of a judgment debtor in allowing his property to be sold on execution because he was under the impression that his interest was not subject to sale and in pretending that his brother, who was in possession, was the owner of the land levied on, will not estop him from obtaining relief in equity from a sale of the property *en masse* for a grossly inadequate price, where the creditor is paid all that is due him, including solicitor's fees in the suit to set aside the sale.

WRIT OF ERROR to the Circuit Court of Boone county;
the Hon. R. K. WELSH, Judge, presiding.

W. C. DEWOLF, for plaintiff in error.

WILLIAM L. PIERCE, and JAMES M. HUFF, for defendant in error.

Mr. JUSTICE FARMER delivered the opinion of the court:

This is a writ of error sued out to review a decree of the circuit court of Boone county granting certain relief prayed in a bill filed by defendant in error, William M. Flemming, (hereafter called complainant,) against plaintiff in error, George C. Tallerday, (hereafter called defendant.)

November 22, 1909, defendant recovered a judgment in the circuit court of Boone county against complainant for \$244.72 and costs. An execution was issued on said judgment the same day it was rendered and was returned unsatisfied. November 24, 1913, an *alias* execution was issued on the judgment, and that execution was levied upon an 80-acre tract of land in which complainant owned a life estate. The property was sold March 11, 1914, by the sheriff under the execution and was purchased by defendant for \$320.12, the amount due him on the judgment and execution. No redemption having been made from the sale, a deed was executed by the sheriff to the defendant July 6, 1915. On July 12, 1917, complainant filed his bill in this case against the defendant, praying, among other things, for leave to redeem from said sale, and that the sheriff's deed be canceled and set aside, and for an accounting of rents and profits. The grounds upon which the relief was prayed were, that the property was sold for a grossly inadequate price; that it was sold *en masse* without first being offered in separate parcels; that there was collusion between the sheriff and the defendant in making the sale; that defendant prevented others from bidding at the sale, and that defendant promised to re-convey to complainant after holding the title as security for his judgment until he was paid the amount due him. The answer denied that there was any fraud or irregularities in connection with the sale of the premises and denied that complainant was entitled to the relief prayed or any part thereof. After replication filed, the cause was referred to a special master in chancery to

take the testimony and report his conclusions of law and fact. The master reported, recommending that the bill be dismissed for want of equity at the complainant's cost. The chancellor sustained exceptions to the master's report, and entered a decree finding that the property was sold by the sheriff at a grossly inadequate price, and that it was sold *en masse* without having first been offered in separate parcels. The decree also found certain other irregularities, but it will be unnecessary to refer to them in our view of the case.

The decree finds that the sale of the property *en masse* without having first been offered in separate parcels, for a grossly inadequate sum, was an irregularity amounting to a fraud, and that the complainant had not been guilty of any conduct which would deprive him of the right to equitable relief and that he was entitled to redeem from the sale. Defendant was in possession of the property and the decree directed him to account for the rents and profits, and that, in addition to being credited with the amount due him on the judgment, he also be allowed a credit of \$150 for solicitor's fees incurred in this suit. The complainant was directed to pay the defendant within thirty days the amount so ascertained and fixed and so found due defendant, and upon payment being made the defendant should surrender up possession to complainant and execute to him a conveyance of the property.

The complainant was the owner of a life estate in the premises in controversy by virtue of the last will and testament of his father, which was admitted to probate November 13, 1913. He never took possession of the premises prior to the sale, but they had been in the possession, up to that time, of his brother. He appears to have been of the impression that his interest could not be sold on execution and to have claimed he did not own the property but that it belonged to his brother. He knew of the levy of the execution and was present at the sale made by the sher-

iff. After the defendant received his deed from the sheriff he brought an ejectment suit against the complainant's brother, of which complainant had knowledge, and recovered possession of the property. The master found from the evidence that the value of complainant's life estate in the 80 acres was about \$5000. It was purchased by the defendant at the sale for \$320.12. This was unquestionably a grossly inadequate price, but defendant contends that the complainant's conduct, and his statement made prior to the sale that he did not have any interest in the property but that it was owned by his brother, who was in possession of it, tended to discourage persons who might desire to bid at the sale, and by his own conduct caused the property to be sold at an inadequate price.

If there were no other irregularities connected with the sale except inadequacy of price it might be the complainant would have no grounds of equitable relief. In *Skakel v. Cycle Trade Publishing Co.* 237 Ill. 482, it was said public policy requires stability to be given judicial sales, and they should not be disturbed unless there has been some mistake, fraud or violation of some duty by the officer making the sale or by the purchaser. In such cases the owner of the land has twelve months to redeem by paying the purchaser the amount of the sale. In the case just referred to it was said that counsel representing the party asking that the sale be set aside and for the right to redeem had cited no case in which the sale had been set aside for mere inadequacy of price. We think the doctrine well established that inadequacy of price, alone, where the sale has been regularly conducted in all respects according to law, may not afford ground for equitable relief, but where there are additional circumstances or irregularities in selling the property, such additional circumstances, together with gross inadequacy of price, may justify relief in a court of equity. The property here in controversy consisted of two adjacent 40-acre tracts of land and was all in a state of cultivation. The sheriff's

return on the execution shows he sold the property to the defendant, the highest bidder, for \$320.12; that defendant paid the costs to the sheriff and the sheriff gave him credit for the amount due him on the execution and returned the execution satisfied in full. From this return it appears the property was not offered in parcels but was offered and sold as an 80-acre tract of land. The attorney who represented the defendant in the collection of his judgment testified he was present at the sale, and that his best recollection was the sheriff inquired if anyone wanted to bid on anything less than the entire 80 acres, and that he afterwards offered it in 40-acre tracts, but the witness was not positive about it. The master held the testimony to be incompetent, and we think correctly so held. The land could easily have been offered in parcels of 10, 20 and 40 acres. It has been repeatedly held that where several tracts of land are levied on, it is the duty of the sheriff to offer it for sale in separate tracts, and if one tract will not sell separately to add another tract to it, and then a third if no bid is had for the two, and so on until it is all offered *en masse*. (*Henderson v. Harness*, 184 Ill. 520.) In *Miller v. McAlister*, 197 Ill. 72, the sheriff's return showed a levy on 80 acres of land; that he offered it in separate tracts of 20 acres each, and receiving no bid he then offered the interest of the debtor in the entire 80 acres and sold it for \$75. The interest of the judgment debtor was worth a little more than \$2000. It was held the sheriff should have offered the property in separate tracts of 20 acres, of 40 acres and of 60 acres, respectively, before selling it as an 80-acre tract. The same rule is stated in *Cohen v. Menard*, 136 Ill. 130, and *Morris v. Robey*, 73 id. 462. In *Lurton v. Rodgers*, 139 Ill. 554, property worth \$2000 or more was sold at execution sale for \$60. This was held to be grossly inadequate, and the court said that, in itself, was not ordinarily sufficient to set aside a sheriff's sale, but, considered with other irregularities in the proceedings, the sale may be set

aside on slight additional circumstances. In that case the property was susceptible of division into parcels but was sold *en masse*. The court said: "Where property susceptible of division has been sold *en masse* for an inadequate price, this court has held in a number of cases that the sale will be set aside if application is made within a reasonable time. (*Morris v. Robey*, 73 Ill. 462; *Berry v. Lovi*, 107 id. 612; *Stoker v. Greenup*, 18 id. 27; *Day v. Graham*, 1 Gilm. 435.) In *Morris v. Robey*, in deciding the case, it is said: 'Although inadequacy of price on an execution sale may be no ground for equitable relief without additional circumstances to justify it, we are of opinion that such additional circumstances do exist in the present case, and that they are to be found in the irregular mode of selling these eight separate lots in gross without having first offered them in parcels of two or more, less than the whole.'" In the case under consideration the sheriff's return shows the property was not offered in parcels, as the law requires, but was sold *en masse* for a grossly inadequate price. In *VanGundy v. Hill*, 262 Ill. 162, the court said, if the property had been offered in parcels before the sale *en masse* the sheriff's return on the execution should have so shown; that the sheriff's return is the best evidence of the manner of conducting the sale,—and this is in harmony with *Cohen v. Menard*, *supra*, and other cases that might be mentioned. In the last mentioned case the court said the presumption of law that an officer does his duty was overcome by the return on the execution. We do not recall any case where relief was not granted where property susceptible of division was not offered for sale as the law requires but was sold in a body at a grossly inadequate price, where the relief was asked for in apt time and the party asking same had been guilty of no conduct which estopped him.

While complainant's conduct and attitude were not of a character to appeal strongly to a court of equity, we find nothing in it to estop him asking that he be permitted, upon

paying defendant everything that was due him, to have his land restored to him. The decree fully protects all the rights of defendant to be reimbursed the amount paid for the land and interest thereon; taxes, if any, and interest thereon; improvements, if any, made by defendant; and an additional sum of \$150 for solicitor's fees in this litigation.

The bill alleges that prior to the bringing of the suit complainant was able, ready and willing and offered to pay to defendant the full amount of the money due him by virtue of the judgment, if he had not been fully paid and reimbursed from the rents and profits of the land. The master found that the rental value of the land was \$500 per year. Defendant rented it for the year 1916 for \$5 per acre and for the year 1917 for \$6 per acre. The language used by this court in *McDaniel v. Wetzel*, 264 Ill. 212, is pertinent here. The court there said: "Before filing his bill he tendered to Wetzel the full amount of his bid, with six per cent interest and the accrued costs in the forcible entry and detainer suit, and if Wetzel had accepted the money he would have suffered no loss, although he would have failed to hold valuable property for a trifling consideration. The circumstances are such that in our opinion the court ought to have set aside the sale and conveyance."

While some other questions were raised on the trial and are discussed in the briefs, we are of the opinion that, independently of their merit or lack of merit, the decree entered by the circuit court is in accordance with the law as established by numerous decisions, some of which we have referred to.

The decree is affirmed.

Decree affirmed.

(No. 12744.—Judgment affirmed.)

THE BIG MUDDY COAL AND IRON COMPANY, Defendant in Error, vs. THE INDUSTRIAL COMMISSION *et al.*—(OWEN PURVIS, Plaintiff in Error.)

Opinion filed October 27, 1919.

1. APPEALS AND ERRORS—*appeal or writ of error does not vacate judgment.* A review by appeal or writ of error is not a trial *de novo* but is a hearing for the correction of errors found to exist in the record, and the taking of an appeal or writ of error does not, of itself, vacate a judgment.

2. WORKMEN'S COMPENSATION—*a writ of error does not vacate award.* A review by writ of error in the Supreme Court does not vacate the award of the Industrial Commission pending the decision on review.

3. SAME—*right to review award on ground that disability has increased or diminished is not affected by writ of error.* The right of either party in a compensation case to file application for a review of an award on the ground that the disability has increased or diminished is not held in abeyance by the pendency of a writ of error, as such right does not depend upon whether or not the award is enforceable at the time of filing the application for review, except in cases where there has been a final determination of the Supreme Court quashing the award.

4. SAME—*when time for filing an application for review under paragraph (h) of section 19 of the Compensation act begins to run.* The purpose of paragraph (h) of section 19 of the Workmen's Compensation act is to fix a period of time in which it may be determined whether the injuries received have recurred, increased or diminished, and the fact that a writ of error is pending in the Supreme Court to review the award does not affect the running of the period of eighteen months, which begins at the time the award is entered.

WRIT OF ERROR to the Circuit Court of Williamson county; the Hon. D. T. HARTWELL, Judge, presiding.

GEORGE R. STONE, for plaintiff in error.

CHARLES E. FEIRICH, for defendant in error.

Mr. JUSTICE STONE delivered the opinion of the court:

The plaintiff in error was injured February 16, 1915, while in the employment of the defendant in error. Both parties were under the Workmen's Compensation act of Illinois and the injury arose out of and in the course of the employment. An award was entered in favor of plaintiff in error on June 15, 1915, which was heard on review by the Industrial Commission and by it affirmed. Within the twenty days prescribed by the statute the cause was taken to the circuit court of Williamson county by *certiorari*, which court on December 8, 1916, quashed the writ of *certiorari* and confirmed the decision of the Industrial Commission. Thereupon the defendant in error by writ of error brought the cause to this court to the April term, 1917, in which court an opinion was filed on the 21st of June, 1917, affirming the judgment of the circuit court. The decision of the Supreme Court is entitled *Big Muddy Coal and Iron Co. v. Industrial Board*, 279 Ill. 235. On July 31, 1917, the plaintiff in error filed with the Industrial Commission his petition under paragraph (h) of section 19 to review the decision of the Industrial Commission on the ground that his disability had increased. On the hearing on this petition the defendant in error moved to dismiss said petition for the reason that such petition was not filed within eighteen months after the award in the said cause. This motion was taken by the commission and considered with the evidence supporting the petition. On December 24, 1917, the commission found that the disability of the plaintiff in error had increased on the 31st day of July, 1917, as a result of which plaintiff in error was then totally permanently incapacitated for work, and it increased his compensation accordingly. The defendant in error by *certiorari* brought the cause before the circuit court of Williamson county, which court quashed the record and set aside the decision of the Industrial Commission and certi-

fied that the cause was proper to be reviewed by the Supreme Court.

The only question presented to this court is whether or not the eighteen months' period for filing the petition for increased disability under paragraph (h) of section 19 began to run at the date of the award of arbitration or at the time the opinion of the Supreme Court was filed, June 21, 1917. It is contended by the plaintiff in error that the issues joined when this cause was before this court were such as to make the award undetermined and the rights of the plaintiff in error pending until those issues were finally determined by this court on June 21, 1917, and for that reason the petition in the case was filed within the eighteen months provided for by the statute in question.

Paragraph (h) of section 19 of the Workmen's Compensation act of 1915 provides as follows: "An agreement or award under this act, providing for compensation in installments, may at any time within eighteen months after such agreement or award be reviewed by the Industrial Board at the request of either the employer or the employee, on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended; and on such review, compensation payments may be re-established, increased, diminished or ended."

It is contended by the plaintiff in error that when a writ of error is sued out of this court the effect is to hold the award in abeyance until a decision of the cause in this court, and that until such decision there is no award. It becomes necessary, therefore, to determine the effect of the writ of error upon the question whether or not an award had been made and should be treated as an award of the Industrial Commission from the date of its entry by the commission. In this respect the award of the commission is similar to a judgment. It is the rule in this State that a review in a court of appeal by appeal or writ of error is not a trial *de novo* but is a hearing for the correction of

errors found to exist in the record. (*Peoria County v. Gordon*, 82 Ill. 435.) The taking of an appeal or writ of error does not, of itself, vacate a judgment. (*Curtis v. Root*, 28 Ill. 367.) We are of the opinion that a review by writ of error in this court does not vacate the award pending decision here.

It is contended that the provision in paragraph (h) of section 19 of the Workmen's Compensation act allowing the filing of an application of review of the award within eighteen months is a statute of limitation; that the award cannot be said to be an award until the final judgment of this court determining the question involved in the case concerning the matter, particularly where the defense is that there is no valid claim on the part of the employee. It is urged that as the employee is unable to obtain any benefit from the award until such final determination, such period of limitation should be held analogous to the Statute of Limitations relating to judgments, which does not begin to run until the right of action on the judgment accrues. There is, however, a distinction between the statute allowing eighteen months for filing an application for review and the statute relating to actions on judgments. In the latter case the statute does not commence to run until the right of action on such judgment accrues, for the reason that until such time as the party having the benefit of the judgment has the right to lay claim to that benefit he can not be required to take any action to enforce such benefit. The law will not require the doing of a useless act. The right to file application for review of an award accrues as soon as an award is made and is not held in abeyance by appeal or writ of error, nor is that right affected by it. The right of either party in compensation proceedings to file application for review of an award does not in any way depend upon whether or not the award, if an award has been made, is at the time of the filing of such application enforceable or is being held in abeyance by appeal or

writ of error. In other words, the right to file an application for review does not depend upon whether or not the award made is enforceable at the time the application is filed, except in cases where there has been a final determination of this court quashing the award. The purpose of paragraph (h) of section 19 is to give a period of time in which it may be determined whether the injuries received recurred, increased or diminished. The processes of nature continue without regard to whether there is an appeal pending in the cause, and therefore the ground for an application for review may arise without regard to whether the cause is still pending on appeal. This period of time is eighteen months and extends from the time of the agreement or the award.

We have held that while the Workmen's Compensation act does not authorize the allowance of interest, yet under the Interest act an award bears five per cent interest on the amount due at the date of the award, and from that date on subsequent installments after they have respectively become due. It was held in *Chicago Traction Co. v. Industrial Board*, 282 Ill. 230, where, as in this case, a writ of error was sued out and the cause reviewed by this court, that interest on compensation installments were computed from the date of the award on installments then due and continued on subsequent installments from the time they became due. From this it will be seen that the date of the award, even in cases under review where such award is sustained, is the date when such an award is entered by the Industrial Commission. In cases where no award has been entered by the commission until after review by this court, the period of eighteen months for filing application for review of compensation begins to run when the commission enters an award on such reconsideration of the cause. This can work no hardship upon either the employee or employer, as either is at liberty to file application for review during

the eighteen months following the award of the commission even though the award is being attacked by writ of error.

We are therefore of the opinion that the circuit court did not err in vacating and setting aside the decision of the Industrial Commission made on review, under paragraph (h) of section 19.

The judgment of the circuit court will therefore be affirmed.

Judgment affirmed.

(No. 12791.—Reversed and remanded.)

THE CITY OF CHICAGO, Appellee, vs. AUGUST WITT *et al.*
Appellants.

Opinion filed October 27, 1919.

1. EMINENT DOMAIN—*fair cash market value is correct measure of damages for land taken.* Where land is taken under the Eminent Domain act the correct measure of damages is the fair cash market value, and this value should always be given the owner as compensation.

2. SAME—*jury cannot ignore the evidence in fixing compensation and damages.* Where land is taken under the Eminent Domain act the jury cannot ignore all the evidence and fix the compensation and damages directly contrary thereto; and even though the evidence is conflicting, an assessment beyond the maximum or less than the minimum fixed by the testimony will not be sustained.

3. SAME—*in determining fair cash market value jury should consider the rental value.* The rental value of property taken by condemnation should be considered by the jury, along with other proper elements, in determining the fair cash market value, even though the improvements are old frame buildings and apparently rapidly depreciating in value.

APPEAL from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding.

GEORGE S. FOSTER, and GEORGE W. WILBUR, for appellants.

WILLIAM A. BITHER, (FRANK D. AYERS, of counsel,) for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This is an appeal from a judgment of the circuit court in a proceeding brought by appellee, the city of Chicago, to condemn for school purposes certain lots at and near the corner of Kedzie avenue and George street, in the north-western part of said city. Seven lots, with the improvements thereon, were involved in the said proceeding, being lots 18 to 24, inclusive, in block 1, Hall's subdivision of block 7, etc. Each of the lots is 123 feet deep and each is 25 feet wide, except lot 24, at the corner of Kedzie avenue and George street, which is 24 feet. Lot 24 has a two-story frame building on it, the first floor being occupied by a drug store, the second floor being used for living purposes. At the rear of said lot there is a small brick building used as a barber shop, and farther to the rear is a small frame building used as a shoe shop. The other lots are occupied by two-story frame buildings. The tenant of the drug store held a lease on the corner lot from 1916 to 1926 at \$40 a month for the first three years, \$50 for four years and \$55 for the last three years. Apparently all the buildings on the other lots were leased at various rentals, running (except one for three years) from month to month or year to year.

It is contended that the jury's verdict in the condemnation proceeding was much too low as to the value of the property, and it is argued that it is clear from the evidence that the jury were misled as to the real values. Three witnesses testified for the board of education, with practical agreement, as to the ground values of the lots. One witness, a contractor, testified as to the value of the buildings. The jury brought in a verdict that the value of the property was \$27,694, which is practically the value fixed by these witnesses for appellee. It is contended by counsel for

appellants that this verdict is \$3.29 less than the minimum value testified to by appellee's own witnesses, and that the jury also deducted \$440 as the value of the leasehold interest of the druggist in lot 24. Counsel for appellee insist that the jury's verdict was \$84.71 more than the value testified to by the witnesses for the board of education.

There was some testimony from witnesses as to the prices received for some of the vacant property within a short distance of the property here under consideration. Three witnesses testified for appellants as to the land values, two others as to the value of the improvements, and two others as to the combined values of lots and improvements. The testimony of all these witnesses for appellants as to the values is much higher than the values found by the jury. The lowest valuation given by any of these witnesses was \$34,500 and the highest \$72,300, the average valuation by these witnesses being approximately \$50,000. The witnesses for appellants took into consideration, in fixing the values, the rents received from the buildings, while it appears that the witnesses for the appellee did not consider the question of rents as material. The evidence shows that, taking the entire rental value of the property, less expenditures, including repairs, taxes, insurance, etc., and capitalizing it at five per cent, would give the value of the property at from three to four times the value found by the jury. It is manifest from the verdict that the jury gave more weight to the testimony of appellee's witnesses than to that for appellants and that they did not seriously consider the rents in reaching their verdict. The three witnesses who testified for the petitioner as to land values were not, in the strict sense of the term, experts. They had had large experience in the real estate business in Chicago, but had very little, if any, special knowledge of the value of property in the particular locality in which this property is situated. They went to the locality, observed appearances and surroundings and testified as to the value.

The witnesses who testified for appellants were much more familiar with the property in that locality and had had a large experience in real estate transactions in that vicinity. What was said by this court in *City of Chicago v. Lehmann*, 262 Ill. 468, as to the comparative weight of the testimony on behalf of petitioner and the property owners applies with like force in this case. These lands were to be taken under the Eminent Domain law, and the correct measure of damages is their fair cash market value. This value should always be given the owner as just compensation for the property taken. In reaching this value it was proper for the jury to take into consideration what the property was renting for. (2 Nichols on Eminent Domain,—2d ed.—sec. 442; *City of Chicago v. Lord*, 276 Ill. 357, and *id.* 544.) The jury may not ignore all the evidence and fix the compensation and damages directly contrary thereto. It is only where the evidence is conflicting that the jury may draw their own conclusions from a personal view. Even then, an assessment beyond the maximum or less than the minimum fixed by the testimony will not be sustained. (*Atchison, Topeka and Santa Fe Railroad Co. v. Schneider*, 127 Ill. 144.) If the \$440 value of leasehold interest be figured in, the jury in this case fixed the value at less than the valuation given by the testimony of appellee's own witnesses and were apparently not influenced in any way by the testimony of appellants and did not seem to take into consideration the uncontradicted testimony as to the rental values. Whether the verdict was \$3.29 below the values given by the witnesses for appellee or \$84.71 more does not lessen the force of the argument of appellants' counsel that the jury followed the testimony of appellee's witnesses and practically ignored that of appellants.

Counsel for appellants insist that the court erred in refusing to give instruction 18 asked on their behalf. That instruction stated to the jury that they had a right, in fixing the fair cash value of the property, to consider the net

rental returns derived from each piece of property at the time the petition for condemnation was filed, and also stated how such net annual returns should be ascertained. Appellants, without question, had a right to have the jury instructed along this line. While this instruction is not aptly worded, it is not pointed out by counsel for appellee how it would tend to mislead the jury or that it was incorrect in any manner. None of the instructions given covered or attempted to cover the ground covered by this instruction. In view of this record we think the court erred in failing to give it. The rental value of the property was certainly an important question to be considered by the jury in reaching the fair cash market value of the property, and while the improvements were old frame buildings and apparently were rapidly depreciating in value, that would furnish no reason why the rental value of the property should not be taken into consideration, along with all the proper elements to be considered in reaching the fair cash market value of the property. *Harrigan v. Boston Elevated Railway Co.* 190 Mass. 577; 2 Nichols on Eminent Domain, (2d ed.) sec. 446.

The testimony of the witnesses was so widely variant that in view of the verdict in this case and all the facts found in the record the failure to give an instruction as to the rents may have had a very large influence as to the verdict reached. We think this cause should be submitted to another jury for its consideration as to the value of the property.

The judgment of the circuit court will therefore be reversed and the cause remanded.

Reversed and remanded.

(No. 12707.—Judgment affirmed.)

JAMES W. STUBBS, Plaintiff in Error, vs. THE INDUSTRIAL COMMISSION *et al.*—(JOHN JOOHS, Defendant in Error.)

Opinion filed October 27, 1919.

1. WORKMEN'S COMPENSATION—*when the former decision is res judicata.* Where it has been determined on a former appeal that there is evidence to support an award for serious and permanent disfigurement, on a second writ of error on the same record as presented in the previous review the former decision will operate as *res judicata* on said issue.

2. SAME—*award fixed by Industrial Commission is not subject to review if within the statutory limit.* The fixing of an award for serious and permanent disfigurement is within the jurisdiction of the Industrial Commission, and the question as to what the amount shall be is not subject to review by the Supreme Court except for fraud, when the award is within the statutory limit.

WRIT OF ERROR to the Circuit Court of Sangamon county; the Hon. E. S. SMITH, Judge, presiding.

GALLAGHER, KOHLSAAT & RINAKER, for plaintiff in error.

GRAHAM & GRAHAM, for defendant in error.

Mr. JUSTICE STONE delivered the opinion of the court:

Plaintiff in error seeks to reverse the judgment of the circuit court affirming the finding and award of the Industrial Commission on the ground that such finding and award were not in compliance with the remanding order of this court, this cause having been previously before this court. *Stubbs v. Industrial Board*, 280 Ill. 208.

It appears that defendant in error, John Joohs, a brick and stonemason, was injured May 3, 1915, while engaged in tearing down a stone wall. He pitched from a scaffold, striking upon his head and shoulders on the cement floor of the building. He received a wound over the left side

of the forehead in the shape of a horse-shoe, requiring some fifteen or twenty stitches to close the wound. Aside from temporary total disability allowed by the Industrial Commission, the commission also allowed the further sum of \$11.55 a week for fifty weeks for serious and permanent disfigurement. On review by this court it was held that while the Industrial Commission has the right to make an award under paragraph (c) of section 8 of the Compensation act for serious and permanent disfigurement, it appeared from the record that it had considered permanent partial disability as ground for recovery. The judgment of the circuit court affirming the award of the Industrial Commission was in that case reversed and the cause remanded for the reason the commission acted contrary to law and its powers in considering other disabilities in determining whether the defendant in error was entitled to an award for disfigurement and the amount he was entitled to. (*Stubbs v. Industrial Board, supra.*) Upon the cause being remanded to the Industrial Commission and the hearing of further testimony an award was entered in the same sum, although the finding and award of the commission specified that the award was for serious and permanent disfigurement, only, and it is here complained by plaintiff in error that such an award was not in accordance with the mandate of this court. The award entered was for \$11.55 per week for fifty weeks.

Under paragraph (c) of section 8 of the Compensation act, where an award is made for serious and permanent disfigurement the amount of such award shall not exceed one-quarter of the amount of the compensation which would have been payable as a death benefit under paragraph (a) of section 7, which section provides a maximum award not to exceed \$3500. It will be seen, therefore, that the award of the Industrial Commission in this case does not exceed the award it is empowered to make for serious and permanent disfigurement, and the question therefore arises

whether or not there is any evidence of serious and permanent disfigurement upon which such a finding can be based.

Upon previous review of this cause this court said (p. 211): "The proof of disfigurement and that it affected the ability of the claimant to procure employment was not very clear, but as it tended to establish that proposition we would not be authorized to reverse the judgment of the circuit court on the ground that there was no proof of permanent disfigurement." The cause comes here on the same record presented in the previous review, with additional evidence. This court there found that there was evidence in the record tending to establish serious, permanent disfigurement, which affected the ability of the defendant in error to secure employment. That decision is conclusive and will operate as *res judicata* on that issue. *City of Chicago v. Lord*, 279 Ill. 167; *Tucker v. People*, 122 id. 583.

The Industrial Commission had jurisdiction to say what the compensation in this case should be, subject to the limitations of the statute. The fixing of this amount is in the hands of the commission, and the question as to what the amount shall be is not subject to review by this court when such award is within the statutory limit as to amount, except for fraud. While the award here under consideration was for the same amount as the former award, that fact does not, of itself, establish that it was not the result of a consideration of the evidence, in the absence of proof that such evidence was not considered. Public officials are presumed to do their duty.

For the above reasons the circuit court did not err in affirming the finding and award of the Industrial Commission, and the judgment of the circuit court will therefore be affirmed.

Judgment affirmed.

(No. 12803.—Judgment affirmed.)

SELENA A. BARTO, Appellee, vs. HARRY D. KELLOGG,
Appellant.

Opinion filed October 27, 1919.

1. **EJECTMENT**—*when testimony of attorney for plaintiff is sufficient to show possession in defendant.* Although the attorney for the plaintiff in an ejectment suit, upon the employment of other counsel to conduct the trial, is competent to testify for the plaintiff, yet upon any controverted question of fact his testimony is entitled to but little weight, but his uncontradicted testimony that the defendant was in possession of the land when suit was brought is sufficient to show that fact.

2. **SAME**—*a homestead estate does not arise from mere fact of ownership.* A homestead estate does not arise from the mere fact of ownership but from occupancy under the conditions specified in the statute, and a quit-claim deed from a grantor to his wife, as evidence to support the chain of title in the plaintiff in an ejectment suit, cannot be objected to as leaving a homestead in the grantor and his heirs, where there is no evidence that the premises were occupied by the grantor as a homestead when the deed was made or at any time before or after.

3. **SAME**—*when copy of demand for possession may be admitted in evidence.* A copy of the demand for possession served upon the defendant in an ejectment suit may be admitted in evidence, although notice to produce the original is served after commencement of the trial, where no delay is asked by the defendant for time to produce the paper, as it is for the court in such case to determine whether reasonable time is given under all the circumstances.

APPEAL from the Superior Court of Cook county; the
Hon. J. J. SULLIVAN, Judge, presiding.

CAVENDER & KAISER, for appellant.

LEMUEL M. ACKLEY, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the
court:

On July 2, 1912, Selena A. Barto, appellee, commenced a suit in ejectment in the superior court of Cook county against Harry D. Kellogg, appellant, to recover possession

of two tracts of land in the village of Arlington Heights, in that county, alleging her ownership in fee simple. The declaration was amended on October 22, 1913, by making Nellie Kellogg, wife of the appellant, a defendant with him, but at the trial the suit was dismissed as to her. Appellant filed a plea of the general issue and afterward two additional pleas,—one denying that he was in possession of the premises, or any part thereof, at the time of the bringing of the suit, and the other denying that he claimed any title or interest in and to an undivided three-fourths of the premises, or any part thereof, at the commencement of the suit. The replication to the first additional plea alleged that the appellant was in the possession of the premises, and to the second additional plea the appellee replied that the appellant claimed title and interest in and to the whole of the premises. There was a trial of the issues, resulting in a verdict on February 11, 1919, for the appellee, and judgment was rendered accordingly and an appeal taken to this court.

The errors assigned and argued are (1) that there was no competent evidence that the appellant was in possession of the real estate at the commencement of the suit; (2) that appellee was not the owner in fee simple of the premises; (3) that the court erred in admitting in evidence certain exhibits offered by the appellee.

Lemuel M. Ackley was the attorney for the plaintiff, but he procured another attorney to conduct the trial and was the only witness for the plaintiff. The tracts of land were spoken of as the five-acre tract and the ten-acre tract, and he testified that prior to the commencement of the suit he was on the tract called the five-acre tract and found Nellie Kellogg, wife of the defendant, in an unpainted farm house on the land; that on July 2, 1912, when he made the demand hereinafter stated for possession of the premises, he asked the defendant what title he claimed to the property, and the defendant stated that he had possession

of the premises under a tax deed and payment of taxes and improvements he had put on the different pieces. The attorney knew when he brought the suit that he would be an indispensable witness, and his conduct in bringing and managing the suit and furnishing the evidence for its successful prosecution was unbecoming, and upon any controverted question of fact his testimony would be entitled to but little weight. The competency of witnesses, however, is not determined by such considerations, and he was entitled to testify if he chose to do so. (*Wilkinson v. People*, 226 Ill. 135; *Bishop v. Hilliard*, 227 id. 382; *Glanz v. Ziabek*, 233 id. 22.) His testimony was not contradicted, and was sufficient, as against the defendant, to show that he was in the possession that he claimed.

The plaintiff proved a connected chain of title by successive conveyances from the government to herself, but one was a quit-claim deed from William H. Sisson to Frances L. Sisson, his wife, dated and acknowledged April 27, 1903, and recorded October 27, 1910, and it is objected that this deed left a homestead estate in the grantor, which was still in him or his heirs-at-law. If Sisson had a homestead estate in the property it was not conveyed by the quit-claim deed to his wife; (*Gray v. Schofield*, 175 Ill. 36; *Davis v. McCullough*, 192 id. 277;) but there was no evidence that the premises were occupied by the grantor as a homestead when the deed was made or at any time before or after. A homestead estate does not arise from the mere fact of ownership but from occupancy under the conditions specified in the statute, and there is no presumption that property is so occupied. There being no evidence that the requisite conditions existed, it cannot be said that the deed did not convey the fee.

Before Sisson made the deed to his wife George H. Gaylord recovered a judgment against Sisson on January 15, 1903, for \$2500. Execution was issued on March 5, 1903, and returned June 5, 1903, "No property found."

On June 8, 1908, the judgment was assigned to Lemuel M. Ackley, who assigned the same on that day to Emma H. Russell, and an *alias* execution was then issued and levied upon the real estate. The execution was returned on March 26, 1909, no part satisfied because the plaintiff failed to advance the necessary costs to advertise and sell the property. On October 22, 1908, Emma H. Russell filed her bill in the superior court against William H. Sisson and wife and other defendants in aid of the *alias* execution, alleging that Sisson was the owner in fee of the premises and praying that he be adjudged to be such owner and certain incumbrances be removed and released of record. A decree entered April 22, 1909, granted the relief prayed for and ordered the sheriff to sell the land levied upon. On August 8, 1910, a writ of *venditioni exponas* was issued but no proceedings were had thereunder, and on December 1, 1910, the court ordered an *alias* writ of the same character commanding the sheriff to sell the property levied on. The property was sold to the plaintiff and a sheriff's deed was executed to her. The evidence showed title in fee simple in the plaintiff.

To prove the replication to the second additional plea the plaintiff offered in evidence a tax deed of the whole of the premises made to the defendant for the taxes of 1903, under which he claimed possession and title.

The claim that the court erred in admitting in evidence copies of deeds in the chain of title rests on the ground that the affidavit of Ackley was not in full compliance with the statute. The affidavit contained every one of the particulars mentioned in sections 35 and 36 of the Conveyance act, and as it met all the requirements of the statute it was sufficient for the introduction of copies. *Glos v. Garrett*, 219 Ill. 208; *Spitzer v. Schlatt*, 249 id. 416; *Wyman v. City of Chicago*, 254 id. 202.

The court admitted a copy of a demand for possession served by Ackley upon the defendant on July 2, 1912, be-

fore the commencement of the suit. Notice to the defendant's attorneys to produce the original had been served after the commencement of the trial, and objection to a copy was made on the ground that notice had not been served for a reasonable length of time to give the defendant an opportunity to produce the paper. No delay was asked for on that ground, and it was for the court to determine whether reasonable time was given under all the circumstances.

The judgment is affirmed.

Judgment affirmed.

(No. 12764.—Judgment affirmed.)

THE FARMERS' GRAIN COMPANY OF CHARLOTTE, Appellant,
vs. MORRIS KANE, Appellee.

Opinion filed October 27, 1919.

1. SALES—*section 4 of Uniform Sales act does not amend Statute of Frauds.* Section 4 of the Uniform Sales act does not amend the Statute of Frauds although it relates to a subject which might properly have been included in that statute, and the use of the words "Statute of Frauds" as a sub-head for said section does not make that section purport to be an amendment of the Statute of Frauds.

2. STATUTES—*when an act is not amendatory of previous law.* The character of an act as amendatory or independent legislation must be determined by a comparison of its provisions with those of previous laws, and an act which neither restricts nor enlarges the scope of the previous laws cannot be amendatory.

3. CONSTITUTIONAL LAW—*section 4 of the Uniform Sales law of 1915 is not invalid.* Section 4 of the Uniform Sales law of 1915 (Laws of 1915, p. 606,) is not invalid as an attempted amendment of the Statute of Frauds without compliance with section 13 of article 4 of the constitution.

APPEAL from the Circuit Court of Livingston county;
the Hon. GEORGE W. PATTON, Judge, presiding.

BERT W. ADSIT, and B. R. THOMPSON, for appellant.

F. A. ORTMAN, and O'DONNELL, DONOVAN & BRAY,
for appellee.

Mr. CHIEF JUSTICE DUNN delivered the opinion of the court:

The Farmers' Grain Company of Charlotte, plaintiff, brought an action of assumpsit against Morris Kane, defendant, for his failure to deliver grain which the plaintiff had bought of him for future delivery. The defendant filed a plea averring that the contract was for the sale of grain of the value of \$500 and upwards; that the plaintiff did not accept or receive any part of the grain and no part of it was delivered to it; that it gave nothing in earnest to bind the contract or in part payment, and that no note or memorandum in writing was signed by the defendant or his agent. A demurrer to the plea was overruled, and the plaintiff having elected to stand by its demurrer, judgment was rendered against it, and it appealed.

The plea is founded on section 4 of the Uniform Sales act. (Laws of 1915, p. 606.) The appellant contends that this section violates section 13 of article 4 of the constitution, because it amends the Statute of Frauds without inserting the law amended in the new act. The title of the Uniform Sales act is, "An act to make uniform the law relating to the sale of goods." It consists of seventy-eight sections and covers very fully the law of such sales, including the formalities of the contract, its subject matter, its conditions and warranties, express or implied, and their effect, its interpretation, and the rights and remedies of the parties to it. Section 4, which appears under the caption "Formalities of the contract," is as follows:

"Sec. 4. *Statute of Frauds.*—(1) A contract to sell or a sale of any goods or choses in action of the value of \$500 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same,

or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf."

Our Statute of Frauds is chapter 59 of the Revised Statutes of 1874. It has been unchanged since its adoption. The Uniform Sales act does not change it. It is applicable to the same cases in the same way as before the passage of that act and applies to no case since the passage to which it did not apply before. Section 4 of the Uniform Sales act applies to no case to which the Statute of Frauds applies, except that if a contract for sale of chattels of the value of \$500 or more were of such a character that it could not be performed within a year, it would be subject to the provisions of section 1 of the Statute of Frauds as well as section 4 of the Uniform Sales act. This did not modify in the least the operation of section 1 of the Statute of Frauds. The use of the words "Statute of Frauds" as a sub-head for section 4 does not make that section purport to be an amendment of chapter 59 of the Revised Statutes. Section 4 relates to a subject which might properly have been included in that chapter. The title of the act which constitutes that chapter is "An act to revise the law in relation to frauds and perjuries," but every subsequent act which deals with frauds or perjuries will not, therefore, be regarded as amendatory of it. The act in question purports to be an independent act dealing with the subject of sales of personal property. The character of an act as amendatory or independent legislation must be determined by a comparison of its provisions with those of previous laws. An act which neither restricts nor enlarges the scope of the previous law and does not modify its application cannot be amendatory of the previous law, and that is the case here.

The judgment is affirmed.

Judgment affirmed.

(No. 12758.—Judgment affirmed.)

E. D. JONES, Appellant, *vs.* CLARK COUNTY, Appellee.

Opinion filed October 27, 1919.

FEES AND SALARIES—\$2500 is maximum salary of State's attorneys in counties not exceeding 30,000 population. In counties not exceeding 30,000 inhabitants the sum of \$2500 fixed by statute as the maximum amount to be paid to State's attorneys for all services includes the sum of \$400 to be paid by the State. (*Smith v. County of Logan*, 284 Ill. 163, followed.)

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Clark county; the Hon. WALTER BREWER, Judge, presiding.

O'HARRAS, WOOD & WALKER, for appellant.

OLEN R. CLEMENTS, State's Attorney, and GRAHAM & SNAVELY, for appellee.

Mr. JUSTICE STONE delivered the opinion of the court:

This is an appeal from the Appellate Court for the Third District affirming the judgment of the circuit court of Clark county, heard in the Appellate Court on appeal. The cause comes here on certificate of importance by the Appellate Court.

The appellant, E. D. Jones, presented to the board of supervisors of Clark county, Illinois, on June 4, 1917, a claim for \$1200 for unpaid salary as State's attorney of said county for four years, beginning December 2, 1912, which was disallowed by said board, from which action an appeal was taken to the circuit court. A jury was waived and the cause submitted to the court on a written stipulation of facts. A judgment was rendered in the circuit court in favor of Clark county and against appellant and for costs.

During the time the appellant was State's attorney of said county he received as compensation for his services the sum of \$2500 for each of the four years, of which sum the county paid \$2100 and the State of Illinois \$400 each year. The population of Clark county, as ascertained by the last census previous to the election held in 1912, at which the appellant was elected State's attorney of the county, was 23,517.

The question involved in this case depends upon the construction that should be given to an act fixing the salaries of State's attorneys, in force July 1, 1912, and particularly to portions of section 1 of said act. It is contended by the appellant that by section 1 of said act he was entitled to be paid as a salary from the county at the rate of \$100 per each 1000 inhabitants and a major fraction thereof, but not in excess of \$2500, and the sum of \$400 from the State in addition thereto, making a total income of \$2800 per year. It is contended by the appellee, and so held by the circuit court and the Appellate Court, that the maximum amount to be paid to the appellant for all of his services is fixed by the statute at \$2500, which includes the \$400 to be paid by the State.

Section 1 of said act is as follows: "That there shall be allowed to the several State's attorneys in this State, hereafter elected, for services to be rendered by them, the following annual salary, to-wit: To each State's attorney in counties not exceeding 30,000 inhabitants, the sum of \$100 per each 1000 inhabitants and major fraction thereof, the said salary to be in addition to that now provided by law to be paid by the State: *Provided, however,* that the maximum sum to be paid any State's attorney in any of such counties shall not exceed the sum of \$2500 per annum. To each State's attorney in counties containing not less than 30,000 inhabitants and not more than 51,000 inhabitants, the sum of \$3500 per annum; to each State's attorney in counties containing not less than 51,000 inhab-

itants and not more than 100,000 inhabitants, the sum of \$5000 per annum in the aggregate, which sum shall include the salary which is to be paid out of the State's treasury as now provided by law; to each State's attorney in counties containing not less than 100,000 inhabitants and not more than 250,000 inhabitants, the sum of \$6000 per annum; to each State's attorney in counties of more than 250,000 inhabitants, the sum of \$10,000 per annum. The population of all counties for the purpose of fixing salaries as herein provided shall be based upon the last Federal census immediately previous to the election of State's attorney in each county."

In the case of *Smith v. County of Logan*, 284 Ill. 163, where said section was construed, it was said: "It would seem to be self-evident that the legislature, in referring specifically to the \$400 to be paid by the State as to two classes of counties, must have had in mind the question whether the \$400 was to be included or excluded in the total salary to be paid to the State's attorneys in the various classes of counties, and it seems the most reasonable conclusion to hold that the legislature, in including specifically this \$400 as a part of the salary in two classes of counties and being silent as to whether or not it should be included in the other three classes of counties, did not intend to have it included in said three classes in which it was not mentioned." While it is urged that the language of the *Smith case* here quoted was not necessary to the decision of that case, the question there under consideration was the construction of the entire section, and, as we view it, is controlling here. The reasons given in that opinion apply with equal force to this case.

The Appellate Court did not err in affirming the judgment of the circuit court. The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

(No. 12729.—Decree affirmed.)

ELLEN BARNES, Appellee, vs. HUGH GULLIFORD, Appellant.

Opinion filed October 27, 1919.

SPECIFIC PERFORMANCE—*fact that the vendee obtained money for payments by the illegal sale of liquor is no defense.* One who has agreed to convey property to another upon the making of certain payments cannot avoid his agreement upon the ground that the vendee obtained the money for her payments by the illegal sale of intoxicating liquor, when the agreement was not based in any way upon the nature of the vendee's business.

APPEAL from the Circuit Court of McLean county; the Hon. SAIN WELTY, Judge, presiding.

RAYBURN & BUCK, for appellant.

JESSE E. HOFFMAN, for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

This is an appeal from a decree of the circuit court of McLean county granting the relief prayed in a bill in chancery by the complainant, who is the appellee here.

The circumstances out of which this litigation arose are substantially as follows: Appellee, Mrs. Ellen Barnes, had been conducting a hotel or rooming house in Bloomington, called the Manor Hotel, for some years. She at one time owned the property, but she mortgaged it to secure a note for \$5000, which mortgage was foreclosed and the property sold to the mortgagor, and not having been redeemed the purchaser received a deed. Appellee continued to occupy the property as a tenant of the owner and pay the rent. Some time in the spring of 1917 she was informed the owner was about to sell the property to another party. The owner required a cash payment of \$2000 and would give time for the payment of the balance. Mrs. Barnes conferred with the attorney for the owner of the property, who is also her attorney in this litigation, and he conducted

the negotiations between the parties leading to the sale of the property. Mrs. Barnes could only raise \$1500 to make the cash payment. Some time previous to the consummation of the purchase, (the exact time is disputed,) a woman known variously as May Gulliford, Mrs. Weinberger and "Snapp" came to Mrs. Barnes' house from Chicago. She appears to have made frequent trips to other places and would return to Mrs. Barnes.' One time she was in a hospital and was taken from that place back to Mrs. Barnes'. When Mrs. Barnes told the woman (to whom we shall refer as May Gulliford) of her desire to purchase the property, the terms of the purchase and her inability to pay more than \$1500, May Gulliford interested herself in the matter and brought about a meeting between Mrs. Barnes and her father, the appellant, who was temporarily in Bloomington, for the purpose of procuring his aid in securing the additional \$500 to make the \$2000 payment. He agreed to undertake to do so and in the course of a few days reported he could raise and advance the \$500. Appellant and appellee, Mrs. Barnes, then went to the attorney for the owner of the property and he prepared a memorandum of an agreement, which recited that the owner of the property was willing to sell it to Mrs. Barnes at the special price of \$6500; that Mrs. Barnes was unable to finance the proposition; that appellant was willing to assist her; that she and May Gulliford were each to share in the benefit or ownership of said property in proportion to the amount of money furnished by each of said beneficiaries; that Mrs. Barnes and May Gulliford were to furnish \$1500 in cash and the appellant was to furnish \$370.63 and place a mortgage for \$5000 on the premises, taking a deed to the property to himself; that on or before six months after the date of the agreement Mrs. Barnes and May Gulliford were to re-pay to appellant \$370.63, with interest at six per cent; that they were to pay the interest on the mortgage, and on or before one year from its date

to pay at least \$500 on said mortgage and all interest thereon, taxes and special assessments, and on or before eighteen months pay another \$500 and all interest on said mortgage debt, and upon said payments being made appellant agreed to convey the property to Mrs. Barnes and May Gulliford, subject to the unpaid balance of the mortgage. That instrument was dated May 28, 1917. Appellant made arrangements with the Corn Belt Bank of Bloomington by which the bank agreed to take his note for \$5000, secured by a first mortgage on the property. The bank would not take the note and mortgage of Mrs. Barnes. It was therefore arranged that the owner of the property should be paid cash for it,—\$6500. He agreed to, and did, convey the property to appellant. Of the purchase price \$5000 was procured, by appellant's note and mortgage, from the Corn Belt Bank. The taxes and special assessments on the property were paid, also the interest and two \$500 payments on the principal of the mortgage note and the amount advanced by the appellant, as agreed in the written instrument, and Mrs. Barnes requested appellant to make her a deed pursuant to said agreement. The appellant declined to do this, but averred he agreed to convey her an undivided one-half interest, which Mrs. Barnes refused to accept.

The answer to the bill filed to compel the conveyance to the complainant alleges that May Gulliford was in partnership with Mrs. Barnes in the hotel and the business there conducted, and that half of the money paid on the property by Mrs. Barnes was the money of May Gulliford. On the 20th of February, 1918, May Gulliford executed an assignment of all her interest to appellant, her father, and both she and her father denied Mrs. Barnes was entitled to the relief prayed in her bill. The cause was referred to the master in chancery, who heard the evidence and reported that May Gulliford had no financial interest in the property by virtue of the agreement; that she had paid no money on the property; that the allegations of complain-

ant's bill were true and that she was entitled to the relief prayed. The court overruled exceptions to the master's report and entered a decree that the payments that had been made were made by Mrs. Barnes; that none of the money paid was furnished by May Gulliford; that she was not a partner in the business with Mrs. Barnes; that the bulk of the receipts from the business came from the illegal sale of intoxicating liquors, and that a court of equity would not lend its aid to an accounting of the profits but would leave the parties in the position they had placed themselves. The decree directed the conveyance of the property by the appellant to Mrs. Barnes as prayed in her bill.

Without entering into detail as to the character and conduct of May Gulliford as shown by the testimony, and the basis of her claim to an interest in the business conducted at the hotel, it is sufficient to say the proof warranted the conclusions of the master and the decree of the chancellor. Appellant admitted he had been paid back all of the money he put in the deal for the property and that the only claim he had in it was by virtue of the assignment from his daughter, May Gulliford. All of the money that had been paid on the property was paid by Mrs. Barnes according to the proof, and if it was in part obtained by her from illegal sales of intoxicating liquors it would not authorize May Gulliford or her assignee to have and retain an interest in the property under the terms of the agreement of May 28, 1917. A very reasonable explanation is given by the testimony for Mrs. Barnes how the name of May Gulliford came to be in the agreement, but however that may be, she and Mrs. Barnes were to share in the property in proportion to the amount of money furnished by each of them. If May Gulliford furnished no money she was not entitled to share in the property. Aside from the question whether the proof showed May Gulliford was in partnership with Mrs. Barnes and that she furnished part of the money paid on the property, appellant's argument is de-

voted to the proposition that by the terms of the written agreement and the nature of the business out of which the money was made to pay on the property Mrs. Barnes is now estopped to assert her right to the property and to procure the relief prayed for in her bill. We think this a misapprehension of the doctrine of estoppel. The agreement in relation to the purchase of the property had nothing to do with the conduct of the business carried on upon the premises. If, as we believe, the record shows Mrs. Barnes furnished all of the money to make the payments on the property as required by the agreement, appellant cannot avoid the performance of his part of the agreement on the ground that she obtained the money from the unlawful sale of intoxicating liquors.

The decree was in accordance with the law and evidence and is affirmed.

Decree affirmed.

(No. 12523.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, vs.
GEORGE I. DANKS, Exr. *et al.* Appellants.

Opinion filed October 27, 1919.

1. INHERITANCE TAX—*Inheritance Tax act does not apply unless conveyance is testamentary or in contemplation of death.* The Inheritance Tax act does not prevent a person from disposing of his property in any legitimate way he sees fit nor prevent a parent from giving the whole or any part of his estate to his children so long as the gift is not intended as a testamentary disposition or made in contemplation of death, but the act merely imposes a tax upon the right of succession through the laws of descent and devise.

2. SAME—*purpose of taxing transfers made in contemplation of death.* The purpose of the provisions of the Inheritance Tax act imposing a tax upon gifts or transfers to take effect after the death of the donor or made in contemplation of his death is to prevent an evasion of the act by a distribution of property just before or in anticipation of the owner's death or by a disposition of a testamentary nature.

3. *SAME—meaning of term “in contemplation of death.”* The term “in contemplation of death” does not mean that general expectation which all rational persons have that they must die some time, but refers more particularly to that apprehension of death which arises from some existing infirmity of such a character as prompts one to make a disposition of his property, and a gift is made in contemplation of death when it is made in expectation of that event or with that event in view.

4. *SAME—what circumstances may be considered in determining whether gift is made in contemplation of death.* Whether a voluntary disposition of property is made in contemplation of death rests upon the facts and circumstances in each case, and in determining this question the donor's age, physical condition, any action contemplated to be taken by him with respect to his health, and the length of time he survives the making of the transfer, are all proper matters to be considered.

5. *SAME—when gift is made in contemplation of death.* Where it is apparent from all the facts that the donor's condition was such that he might reasonably have expected death at any time, and where the disposition of his property is such as he had contemplated making or such as he might reasonably be supposed to have desired to be made at his death, and no other cause is apparent for making the transfer at the time it was made, a conveyance to the donor's daughter will be deemed to have been made in contemplation of death, even though the transfer is absolute in form and effective in the grantor's lifetime.

APPEAL from the County Court of Effingham county;
the Hon. BARNEY OVERBECK, Judge, presiding.

GEORGE I. DANKS, and PAUL TAYLOR, for appellants.

EDWARD J. BRUNDAGE, Attorney General, FLOYD E.
BRITTON, and HARRY S. PARKER, for the People.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

This is an appeal from a judgment of the county court of Effingham county fixing a tax of \$3213 under the Inheritance Tax law against Maude B. Danks on account of property transferred to her by her father, William Gillmore. No question is raised as to the regularity of the

proceedings by which the tax was assessed, so the only question in controversy is the liability for such tax of certain real estate conveyed to Maude B. Danks by deeds made by William Gillmore, deceased, two years prior to his death. The county court held the transfers were taxable as gifts made "in contemplation of death," and accordingly entered an order assessing the tax. From this decision George I. Danks, as executor, and Maude B. Danks, have prosecuted their appeal to this court.

The facts were stipulated in the trial court, and so far as they are material to be considered here may be stated as follows: William Gillmore, a resident of Edgewood, Effingham county, this State, departed this life testate on May 9, 1917, leaving him surviving Maude B. Danks and James L. Gillmore, his children and only heirs-at-law. He left an original will, dated November 13, 1907, to which were attached two codicils,—one dated December 3, 1912, shortly after the death of his wife, and the other November 13, 1915, a week after the execution of the last deed here in question. The will and codicils were duly admitted to probate and letters testamentary issued. The appraised value of his estate, other than the land on which the tax in controversy was assessed, was \$89,421.30. Maude B. Danks, as residuary legatee under such will, received notes and personal property aggregating \$67,567.16. She also received from her father, by assignment made on November 6, 1915, notes and mortgages aggregating \$44,000, on which he reserved the interest or income during his life. It is admitted this property was subject to an inheritance tax. In addition to the above property, deceased in his lifetime conveyed to his daughter, Maude, real estate valued at \$69,083. March 26, 1915, he executed three deeds conveying to her a tract of 1355.41 acres, valued at \$31,834, and November 6, 1915, he executed four deeds conveying to her 1024.23 acres, valued at \$37,249. All of this land is situated in Effingham county, this State. The deeds were

intended as absolute conveyances of the property described therein, and were duly executed, acknowledged and delivered at the time made. The consideration stated in each deed is "love and affection and one dollar." At the time the deeds were made the land was under lease to George I. Danks, son-in-law of the deceased, at an annual rental of one dollar. The lease was made January 1, 1914, and runs for the period of the natural life of the lessor, William Gillmore. At the time the deeds were made Gillmore was affected with heart trouble and arterio sclerosis of some two or three years' standing and was continually under treatment and care of a physician. He had consulted a specialist and was fully advised as to the nature of his trouble. He was taking medicine daily for his heart. During the last two or three years of his life he was constantly attended by a maid. He was not, however, confined to his bed but was up and around the house and nearly every day went to his store, a short distance from his home. At the time the deeds were made his condition of health was fairly good, considering his age and the nature of the disease with which he was afflicted, and it is not claimed his condition was then any different from what it had been for some months before. No serious attacks of heart trouble are shown to have occurred until a few days before his death. Some years before he died he gave to his son, James L. Gillmore, a tract of 160 acres of land in Clay county, in this State, and \$1000 in cash. This deed is dated May 1, 1905. At the same time he took from his son a receipt, in which it was recited that the father had previously given the son money and other property, and that in consideration of such gifts and conveyances made it was agreed that the son had received his full share in the estate, and that in the event his father preceded him in death he would not be entitled to any share in the estate, nor would he have any claim or demands, of any kind or nature whatever, against it. The value of the property previously given

to the son is not shown. On September 6, 1912, he also made a gift of a tract of 62 acres of land in Effingham county to a nephew, Erastus S. Gillmore, by executing a deed to the same, which was placed in a sealed envelope and left with a bank at Edgewood, to be delivered to the grantee at the grantor's death. No gifts or transfers of property of any kind are shown to have been made to Maude B. Danks prior to the conveyances in question, unless the lease of this land to her husband on January 1, 1914, can be so considered. About ten years before his death the deceased induced his daughter and her husband, George I. Danks, to give up their home in the west and come and reside with him. At the time this was done George I. Danks took upon himself the management of the business of deceased, and in return received a grocery store located at Edgewood and \$1000 worth of stock in the First National Bank of Effingham, and later a lease to the land subsequently conveyed to the daughter, and a gift of the horses, cattle and farm tools which the deceased then owned. It is also stipulated that deceased on several occasions told the officer who took the acknowledgment to the deeds that he was going to give his land to his daughter, and that on the day the last deed was executed he told the officer he was giving all his land to Maude. By his original will, executed November 13, 1907, he gave the bulk of the property he then owned, including the property against which the tax in question was assessed, to his daughter, and by the codicil executed December 3, 1912, shortly after the death of his wife, he gave to his daughter the property he had previously devised to his wife, and by the second codicil, made November 13, 1915, he directed that his daughter pay to her brother, James L. Gillmore, \$30 a month so long as he lived, with the further provision that should the son attempt in any way to contest the will or any disposition made by him of his property, the son should forfeit his right to such monthly payment.

The sole question presented by this record is whether or not, under the facts as stipulated, with all legitimate inferences to be drawn therefrom, the conveyances in question are to be deemed to have been made "in contemplation of death," as those words are used in the statute. The Inheritance Tax law was not intended to prevent a person from disposing of his property in any legitimate way he sees fit, (*People v. Burkhalter*, 247 Ill. 600,) nor to prevent a parent, in his lifetime, from giving to his children the whole or any part of his estate, so long as the gift was not intended as a testamentary disposition of his property or made in contemplation of the donor's death. (*People v. Kelley*, 218 Ill. 509.) The law merely imposes a tax upon the right of succession to the ownership of property through the operation of the laws relating to descent and devise. (*Kochersperger v. Drake*, 167 Ill. 122; *In re Benton*, 234 id. 366.) The purpose of the provisions imposing a tax upon gifts and transfers intended to take effect in possession or enjoyment after the death of the donor or made in contemplation of his death was to prevent an evasion of such laws by a distribution of property just before or in anticipation of the owner's death. Its manifested purpose was to include all gifts or transfers made prior to the donor's death which were similar in their nature and effect to a testamentary disposition of property or accomplished the same object, under circumstances which imparted to it the characteristics of a devolution of property made in anticipation of the donor's death. *Rosenthal v. People*, 211 Ill. 306.

A gift is made "in contemplation of death" when it is made in expectation of that event or with that event in view. (*Rosenthal v. People*, *supra*.) The term does not mean that general expectation which all rational persons have that they must die some time, but refers more particularly to that apprehension of death which arises from some existing infirmity of such a character as would prompt an ordinarily prudent person to make a disposition of his prop-

erty and bestow it upon those whom he regarded as most entitled to be the recipients of his bounty. (*People v. Carpenter*, 264 Ill. 400.) What prompts the making of such a conveyance rests upon the facts and circumstances surrounding each particular case. No general rule can be formulated which will fit all cases but each case must be examined and determined on its own facts and circumstances, in the light of the experience which the courts have gained in dealing with such matters. For this purpose the donor's age, physical condition, and any action contemplated to be taken by him with respect to his health, as well as the length of time he survives the making of the transfers, are all proper matters to be considered in determining whether or not the act was done in contemplation of death. If, upon a consideration of all the surrounding facts and circumstances, it is apparent the donor's condition was such that he might reasonably have expected death at any time, and the disposition made of his property is such as he had contemplated making in that event or such as he might reasonably be supposed to have desired to be made at his death, and no other moving cause is apparent for making the transfer at the time it was made, the gift will be deemed to have been made in contemplation of death, even though the transfer is absolute in form and such as would invest the donee with the absolute right to the property during the lifetime of the donor. (*Rosenthal v. People*, *supra*; *Merrifield v. People*, 212 Ill. 400; *People v. Porter*, 287 id. 401.) In the instant case the donor was past eighty-eight years of age, in poor health, under a specialist's care and constantly in charge of an attendant or maid. He was affected with an incurable disease, was fully advised of that fact, and was no longer taking any active interest in his business affairs. His whole environment was that of a man who realized that he had not long to live, and his thoughts seemed centered upon making provision for those who were to enjoy his property after his death.

This is shown by the transfer of his store and farm property to his son-in-law; the execution of a lease of the land in question, at a nominal rental, for the period of his natural life; the gift of certain of his property to his son; the taking from the son of an acknowledgment that he had received his share of his father's estate; the execution of the deed for certain lands to his nephew, to be delivered at his death; the execution of the deeds in question; the assignment of the notes and securities to his daughter, in which he reserved the interest or income during his life; and the almost simultaneous execution of the codicil to his will, by which he endeavored to make the prior gifts to his daughter doubly secure to her. All of these are the acts of a man who realizes that his death is apt to occur in the near future and is making preparation for that event. In this respect the case at bar is clearly distinguishable from *People v. Kelley, supra*, the case mainly relied upon by appellants. In that case the trust deed was executed because the donor felt his sons were not making as much money in their business as their stations in life required, and the object of the trust deed was to place them in the present enjoyment of the income of the property and supply them with ample means for their stations in life. No such object prompted the making of the transfers in question here. By the deeds in question no estate in present enjoyment was created in the daughter and she was not presently enriched by the conveyances. The land conveyed was still subject to a lease to her husband at a nominal rental and she would not come into the enjoyment of it until after her father's death. The conveyances by deed merely confirmed in her what her father had already provided she should take under the will.

The judgment of the county court of Effingham county was right, and it is affirmed.

Judgment affirmed.

(No. 12086.—Reversed in part and remanded.)

THE PEOPLE *ex rel.* P. L. Dorris, County Collector, Appellant, *vs.* J. B. Ford *et al.* Appellees.

Opinion filed October 27, 1919.

1. TAXES—*ordinance for city taxes must specify purposes of appropriations.* The statute requires an ordinance for the levy of municipal taxes to specify in detail the purposes for which appropriations are made and the amount for each purpose, but it is proper to levy a single sum for distinct purposes which are embraced within the same general object.

2. SAME—*levies for water, electric light and police and fire departments are for separate purposes.* A city tax levy for water, for electric light and for police and fire departments is a levy for separate purposes not within the same general object and should be itemized in separate amounts for each purpose.

3. SAME—*what is collateral attack upon judgment of confirmation.* The levy of a tax is the means prescribed by the statute for enforcing a judgment of confirmation in a special taxation proceeding, and upon the county collector's application for judgment for city taxes an objection to an item of levy to pay the amount apportioned to the city in the judgment of confirmation is a collateral attack upon said judgment.

4. SPECIAL TAXATION—*judgment of confirmation cannot be collaterally attacked except for want of jurisdiction.* A judgment of confirmation in a special taxation proceeding cannot be collaterally attacked no matter how erroneous it may be, except where the court has no jurisdiction in the proceeding, and its judgment is a nullity.

5. SAME—*statute gives county court jurisdiction to determine every question relating to special tax.* Upon the filing of a petition in a special taxation proceeding the statute gives the county court jurisdiction to determine every question relating to the special tax and who or what property shall be charged with the tax.

6. SAME—*city may consent to make up deficiency and submit to judgment of confirmation.* Though an ordinance for a special tax provides that the entire cost of the improvement shall be borne by the property owners, yet where the property owners have secured such a reduction of the tax on their lots as to create a deficiency the city may consent to make up the deficiency on account of public benefits and submit to the judgment of confirmation to prevent abandonment of the improvement, where the benefit equals the cost.

7. JURISDICTION—*what is jurisdiction of subject matter.* The word "jurisdiction," as applied to courts, means authority conferred by law to hear and determine controversies concerning certain subjects, and jurisdiction of the subject matter is the power to hear and determine causes of the general class to which the proceedings in question belong.

8. MUNICIPAL CORPORATIONS—*judgment against a municipality binds the tax-payers.* A judgment against a municipality for an obligation is binding upon every citizen who is compelled to discharge the obligation, and every tax-payer is a real, though not a nominal, party to the judgment and cannot dispute its validity.

APPEAL from the County Court of Saline county; the Hon. J. M. ENDICOTT, Judge, presiding.

J. B. LEWIS, State's Attorney, (A. H. BAER, and W. F. SCOTT, of counsel,) for appellant.

W. C. KANE, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The county collector of Saline county applied to the county court for judgment against property of the appellees delinquent for the taxes levied by the city of Harrisburg. The appellees objected to four items of the tax: (1) "For water and electric light \$7000;" (2) "For police and fire department \$3000;" (3) "For contingent expenses \$1000;" (4) "For the purpose of paying \$1010 principal and \$290 interest, being the first installment on the amount due from the city as special benefits accruing to said city by reason of Jackson street paving district, in said city." The court sustained objections to these items and refused judgment.

The statute requires a city council, in an ordinance for the levy of municipal taxes, to specify in detail the purposes for which appropriations are made and the amount appropriated for each purpose. (*Cincinnati, Indianapolis and*

Western Railway Co. v. People, 207 Ill. 566; *People v. Fenton and Thomson Railroad Co.* 252 id. 372.) It is proper to levy a single sum for distinct purposes if they are embraced within the same general object, but not otherwise. The levy for water and electric light and the levy for police and fire department were each of them for separate purposes not within a single general object, and the ruling of the court concerning those items was correct. (*People v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co.* 231 Ill. 209; *People v. Ross*, 272 id. 63.) It is conceded by counsel for appellant that the item for contingent expenses was improper and the objection properly sustained, which disposes of the first three items.

The remaining item of \$1300, being \$1010 principal and \$290 interest, was for public benefits adjudged by the county court against the city to pay for the cost of paving streets in the city. The estimated cost of the improvement was \$130,646.85, and the ordinance provided that the whole cost, including \$7395, the estimated cost of making, levying and collecting the tax, should be paid by special taxation to be levied upon the property contiguous to the improvement in proportion to frontage. The city filed a petition in the county court praying for the levy of the special tax in accordance with the provision of the ordinance. Property owners appeared and objected that their property had been taxed more than it would be benefited, and upon a trial by jury a verdict was returned reducing the tax on a great many pieces of property. The reductions amounted to \$9617.18, so that the total tax was that much less than the estimated cost of the improvement. The court thereupon found that the city would be benefited to the amount of the deficiency as public benefits and assessed the same against the city, and the city moved for the confirmation of the special tax as changed, altered or amended by the orders of the court. Judgment of confirmation of the special tax was thereupon entered, and it was stipulated on

the trial of the case that the improvement was constructed by the city and completed in pursuance of the ordinance and that the completion and cost were certified to the court and confirmed prior to the application for judgment.

The levy of a tax is the means prescribed by the statute for enforcing a judgment of confirmation and collecting the tax, and the objection of the appellees was a collateral attack upon the judgment of confirmation. (*Steenberg v. People*, 164 Ill. 478; *Gross v. People*, 172 id. 571; *Foster v. City of Alton*, 173 id. 587; *Glover v. People*, 188 id. 576; *Napieralski v. West Chicago Park Comrs.* 260 id. 628.) The judgment of confirmation, therefore, could only be attacked on the ground that the county court was without jurisdiction, so that its judgment would be a nullity, conferring no rights and affording no protection. If the county court, upon the application for the confirmation of the special tax, was without jurisdiction to hear and determine whether a part of the costs of the improvement should be paid by the city, the judgment could be attacked at any time by anyone. (*Haywood v. Collins*, 60 Ill. 328; *Milner v. Rowan*, 251 id. 344.) If, however, the court had jurisdiction to act concerning the subject matter, the judgment could not be collaterally attacked no matter how erroneous it might be. (*People v. Seelye*, 146 Ill. 189; *Leitch v. People*, 183 id. 569; *Perisho v. People*, 185 id. 334; *Martin v. McCall*, 247 id. 484; *Donner v. Highway Comrs.* 278 id. 189.) The word "jurisdiction" has frequently been used in a general sense, without regard to its exact meaning, and has been applied not only to courts but to modes of procedure and authority of boards, legislative bodies or other agents authorized to act upon a certain subject. (*Sumner v. Village of Milford*, 214 Ill. 388.) As applied to courts, jurisdiction is authority conferred by law to hear and determine controversies concerning certain subjects. Jurisdiction of the subject matter is the power to hear and determine causes of the general class to which the proceedings

in question belong. (*People v. Harper*, 244 Ill. 121; *Kuzak v. Anderson*, 267 id. 609.) As applied to a particular controversy, jurisdiction is the power to hear and determine that controversy. (*People v. Talmadge*, 194 Ill. 67.) What shall be adjudged between the parties is the exercise of jurisdiction, and with respect to the confirmation of a special tax, jurisdiction is conferred by the statute, and jurisdiction of the particular case here involved was acquired by the filing of the petition by the city. A petition being filed, the county court had jurisdiction to determine every question relating to the special tax and who or what property should be charged with it. One of the questions was the apportionment of the cost as between the city and the property, and the city council had acted in respect to that question by providing that the whole cost should be charged against property. It has been decided in a great many cases that owners of property upon which a special tax is levied cannot object that no part of the cost of the improvement has been apportioned to the municipality for public benefits but the determination of the city authority upon that question is conclusive. (*City of Jacksonville v. Hamill*, 178 Ill. 235; *Birket v. City of Peoria*, 185 id. 369; *City of Peru v. Bartels*, 214 id. 515; *City of East St. Louis v. Illinois Central Railroad Co.* 238 id. 296; *City of Ottawa v. Colwell*, 260 id. 548; *City of Watseka v. Orebaugh*, 266 id. 579.) These decisions have resulted from a construction of the Local Improvement act and have not been based on any want of jurisdiction to construe the act. If property owners, on objection, secure a reduction of the tax on their lots so as to create a deficiency, unless the city may consent to make up the deficiency on account of public benefits the improvement must be abandoned. (*Kuehner v. City of Freeport*, 143 Ill. 92.) It has never been held that a municipality may not give such consent and proceed with an improvement which it has been found will be a benefit equal to its total cost. Assuming for this

decision that the determination whether the city should pay any part of the cost of this improvement was for the city, the tax being reduced so as to create a deficiency, it would have been impossible to confirm a tax which would not pay for the improvement. The city had asked the court to confirm the tax and moved the court to confirm it as altered, changed and amended and proceeded to make the improvement. There was express consent, ratified and confirmed by proceeding to make the improvement in pursuance of the judgment. The cost was divided into ten installments and bonds were issued by the city, and the city would not now be heard, as against the holders of bonds, to assert error in the judgment. Courts would be an object of derision if they should say that they would compel the city to fulfill its obligation by levying and collecting a tax but the tax-payers could successfully obstruct and defeat collection of the tax for the payment of the obligation. A judgment against a municipality for an obligation is binding upon every citizen who is compelled to discharge the obligation, and every tax-payer is a real, though not a nominal, party to the judgment and cannot dispute its validity. *Freeman on Judgments*, (3d ed.) 178; *Harmon v. Auditor of Public Accounts*, 123 Ill. 122; *County of DeWitt v. Leeper*, 209 id. 133; *North Fork Drainage District v. Rector Special Drainage District*, 266 id. 536.

The court erred in sustaining the objection to the tax to pay the installment due from the city.

The judgment of the county court is reversed as to the tax for principal and interest for the city's share of the cost of the improvement and the cause is remanded to the county court, with directions to overrule the objection to that item and to render judgment accordingly. In all other respects the judgment of the county court is affirmed.

Reversed in part and remanded, with directions.

(No. 12459.—Reversed and remanded.)

THE PEOPLE *ex rel.* William Moltz *et al.* Appellees, *vs.*
W. M. BARBER *et al.* Appellants.

Opinion filed October 27, 1919.

1. *QUO WARRANTO*—*information in nature of quo warranto is a civil remedy.* While an information in the nature of *quo warranto* must be carried on in the name of the People it is a civil remedy to call upon the defendant to show by what warrant the exercise of the franchise or privilege is claimed, and it is not necessary that the People should present or prosecute the information.

2. *SAME*—*when individual may prosecute information to protect private rights.* While a proceeding by information in the nature of *quo warranto* is grounded on alleged usurpation of a franchise of a public nature and not purely private, yet where an individual has a private right, distinct from that of the public at large, affected by a franchise or privilege, he may require the State's attorney to file a petition for leave to file an information and may prosecute the suit for protection of his rights.

3. *DRAINAGE*—*one land owner cannot object that land of another was not properly annexed to district.* Although land owners objecting to the annexation of their lands to a drainage district under section 42 of the Farm Drainage act may join as relators in the same information the annexation is separate as to each tract, and one owner cannot object that the land of another was not properly annexed to the district.

4. *SAME*—*the Supreme Court has no jurisdiction as to lands of owners who have not appealed.* The jurisdiction of the Supreme Court is acquired by appeal or writ of error, and where land owners have prosecuted an information in the nature of *quo warranto* to test the legality of the annexation of their lands to a drainage district and judgment has been rendered against them, on appeal to the Supreme Court a judgment of reversal does not affect the lands of the relators who have not joined in the appeal.

APPEAL from the Circuit Court of Christian county; the
Hon. J. C. McBRIDE, Judge, presiding.

TAYLOR & TAYLOR, and W. B. McBRIDE, for appellants.

BROWN & BURNSIDE, and J. E. HOGAN, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

An information in the name of the People of the State of Illinois, on the relation of the owners of sixty-two separate tracts of land, was filed in the circuit court of Christian county against appellants, commissioners of Union Drainage District No. 1 of the towns of Pana and Assumption, to test the legality of the annexation to the district of the several tracts of land. The defendants filed a plea justifying the annexation under section 42 of the Farm Drainage act, which provides that if individual land owners outside the district shall connect their lands with the ditches of the district they shall be deemed to have voluntarily applied to be in the district, and alleging that each land owner had so connected his land with the ditches of the district. A replication denying that the relators had connected their several tracts of land with the ditches of the district was filed, and there was a trial by jury, resulting in a verdict of not guilty and judgment in favor of the defendants. On appeal to this court by a large number of the relators, not including the appellees, the judgment was reversed and the cause remanded. (*People v. Barber*, 265 Ill. 316.) The cause being re-instated in the circuit court, the defendants filed three pleas as to different tracts of land: First, a disclaimer of any right to exercise jurisdiction over certain lands described in that plea; second, a plea of *res judicata* by the original judgment of the circuit court as to the owners of lands who did not appeal from that judgment; third, a plea of justification as to the lands not included in the first or second plea, alleging that the owners had made connections required by the statute with the ditches of the district. To the second plea the relators named therein filed a demurrer, which was overruled, and they then filed a replication setting forth the decision of this court on the appeal of other relators, and to that replication the defendants

demurred. The demurrer was overruled and the defendants elected to stand by the demurrer, whereupon the relators asked for judgment on the lands described in the plea but none was entered. There was a trial of the issue raised by the third plea of justification, resulting in a verdict and judgment for the relators named in that plea. The judgment of ouster was only as to the lands described in the third plea and did not include the lands described in the disclaimer nor in the plea of *res judicata*. From that judgment an appeal was prosecuted to this court and the judgment was affirmed. (*People v. Drainage Comrs.* 282 Ill. 514.) Afterward the circuit court found, from competent evidence of the fact, that judgment was pronounced as to the lands described in the second plea on March 9, 1917, but the clerk failed to enter the judgment of record, and judgment was therefore entered *nunc pro tunc* as of that date, ousting the defendants from exercising any jurisdiction over said lands and for costs. From that judgment this appeal was prosecuted.

The replication set forth that the relators jointly and severally prayed an appeal to this court from the judgment of the circuit court in favor of the defendants; that the appeal was allowed upon the relators, or any of them, filing an appeal bond, to be approved by the clerk, within forty days, and that an appeal bond was filed in the case by certain of the relators and the judgment was reversed. By the replication the relators claimed the benefit of the judgment of reversal on the appeal prosecuted by other owners of lands, and the court gave them that benefit by overruling the demurrer.

An information in the nature of *quo warranto* must be carried on in the name of the People, but it is not necessary that the People should present or prosecute the information. (*Cheshire v. People*, 116 Ill. 493.) The action being grounded on alleged usurpation or misuse of a franchise or privilege, the franchise or privilege must be of a

public nature and not purely private; but where an individual has a private right distinct from that of the public at large, affected by a franchise or privilege, he may compel the State's attorney to file a petition for leave to file an information and may prosecute the suit for protection of his rights. (*People v. Healy*, 230 Ill. 280.) The proceeding is a civil remedy to call upon the defendant to show by what warrant the exercise of the franchise or privilege is claimed. The right to include any tract of land in a drainage district under section 42 of the Farm Drainage act depends upon the owner of that tract having connected his land with the ditches of the district, but where different land owners question the right of drainage commissioners to annex their lands to a drainage district, any number of separate land owners may join as relators in the same information. (*People v. O'Connor*, 239 Ill. 272.) If the commissioners in such case attempt to justify their action in annexing lands of the relators to the drainage district, it is incumbent upon them to prove such connection as to each separate tract of land. The annexation is separate as to each tract although many tracts may be annexed at the same time, and one owner cannot object that the land of another was not properly annexed to the district. *People v. Bug River Drainage District*, 189 Ill. 55; *People v. Barber*, *supra*.

There was a final judgment against the owners of the lands described in the second plea and the owners did not join in the appeal. The jurisdiction of this court is acquired by appeal or writ of error, and the court had no jurisdiction to review the judgment of the circuit court as to lands whose owners did not appeal nor assign errors on the record. Whatever was said by the court in the opinion delivered or whatever judgment was entered was necessarily limited to the case over which the court had jurisdiction. Those who appealed from the judgment assigned errors on the record, which was their declaration of alleged errors committed against them, but they could not complain that

the judgment was wrong as to the lands of others, concerning which they had no right to object in the circuit court. The judgment for the defendants was in full force, not set aside or reversed, and was final and conclusive as to the lands of the appellees named in the second plea, and the court erred in overruling the demurrer.

The judgment of the circuit court is reversed and the cause remanded, with directions to sustain the demurrer to the replication.

Reversed and remanded, with directions.

(No. 12570.—Decree affirmed.)

JESSE T. ELMORE *et al.* Plaintiffs in Error, *vs.* PHILIP
CARTER *et al.* Defendants in Error.

Opinion filed October 27, 1919.

1. WILLS—one cannot ordinarily take under a will and against its terms. One who accepts the benefit of a provision in his favor in a will is precluded from attacking and defeating a bequest or devise to another by the same will if his acceptance is with full knowledge of the facts.

2. SAME—party taking under a will is not precluded from questioning devise which is void. One who accepts a benefit under a will is not precluded from questioning the validity of other provisions of the will as opposed to the law or public policy, and the fact that a widow has accepted an unconditional life estate under her husband's will does not preclude her or her heirs from taking as intestate estate a remainder given to a charitable corporation under a provision of the will which was void because contrary to a statute and because the corporation has ceased to exist. (*Ellis v. Dumond*, 259 Ill. 483, distinguished.)

WRIT OF ERROR to the Circuit Court of Clinton county;
the Hon. THOMAS M. JETT, Judge, presiding.

JARVIS DINSMOOR, and H. A. BROOKS, for plaintiffs in error.

MAURICE B. JOHNSTON, and HUGH V. MURRAY, (THOS. E. FORD, WILLIAM JOHNSTON, and R. H. FLANAGAN, of counsel,) for defendants in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

By the writ of error in this case the court is called upon to decide rights of inheritance in 178 acres of land in Clinton county between the heirs of Walton Elmore, who died childless, and the heirs of his widow, Susan Elmore, who after his death was married to Thomas J. Ritchie. Walton Elmore made his will on April 7, 1893, and died on April 10, 1893. By the will he devised a life estate to his wife, Susan Elmore, with remainder in fee to the Transit and Building Fund Society of Bishop William Taylor's Self-Supporting Missions. On September 1, 1916, two sisters and the heirs-at-law of a deceased brother of the testator, who together constituted his heirs-at-law, filed their bill against the mission society, alleging that it was a New York corporation incapable of taking the land by devise, and praying that the devise to it be set aside and declared void and the land be partitioned among the heirs-at-law. Upon a joinder of issue and evidence heard by the chancellor the prayer of the bill was granted, on the grounds that by the provisions of the charter and the law of New York such a devise must be made and executed at least sixty days previous to the death of the testator, and because the mission society had become civilly dead and ceased to exist before the death of the testator. On June 30, 1917, the defendants in error, collateral relatives and heirs-at-law of Susan Elmore Ritchie, who died March 8, 1916, intervened in the case, answered the original bill and filed a cross-bill, alleging that the devise to the New York corporation being invalid, Susan Elmore, widow of Walton Elmore, on his death became seized in fee of the undivided one-half of the lands, which descended at her death to her heirs-at-law.

The cause was heard upon a stipulation of facts. The widow, Susan Elmore, accepted the devise to her, acted as administratrix with the will annexed and administered the estate of her deceased husband, and the names of the heirs of Walton Elmore and Susan Elmore Ritchie were properly set forth in the proceedings. The chancellor entered a decree on May 14, 1917, finding the respective interests as set forth in the amended cross-bill and ordered partition accordingly.

One who accepts the benefit of a provision in his favor under a will is precluded from attacking and defeating a bequest or devise to another by the same will if his acceptance is with full knowledge of the facts, or, otherwise stated, one cannot take under a will and against its terms. (*Wilbanks v. Wilbanks*, 18 Ill. 17; *Brown v. Pitney*, 39 id. 468; *Lessley v. Lessley*, 44 id. 527; *Gorham v. Dodge*, 122 id. 528; *Fry v. Morrison*, 159 id. 244; *Madison v. Larmon*, 170 id. 65; *Buchanan v. McLennan*, 192 id. 480; *Richardson v. Trubey*, 250 id. 577; *Koelling v. Foster*, 254 id. 494; *Palenske v. Palenske*, 281 id. 574.) While that is true, one who accepts a benefit under a will, and thereby admits that its provisions constitute the will of the testator, is not precluded from questioning the validity of the will as opposed to the law or public policy, as in the case of a provision violating the rule against perpetuities. (*Matter of Walkerly*, 108 Cal. 659.) This was declared to be the law in *Schuknecht v. Schultz*, 212 Ill. 43, in which there were devises to the testator's son until the youngest grandchild of the testator should be twenty-five years old, when the property was to be divided equally among the grandchildren. The complainant, J. Fred Schuknecht, was a beneficiary under the will and filed his bill to have the third and fourth devises declared void under the rule against perpetuities. It was contended that he was bound to confirm and ratify every other part of the will, but it was held that the doctrine of election had no application to the facts;

that where a devisee or legatee takes something under the will to which he would not be otherwise entitled, and at the same time seeks to hold property disposed of by the will to which he would have been entitled if there had been no will, the doctrine of election applies, but that the clauses of the will violating the rule against perpetuities being void, must be treated as though never made and constituting no part of the will. The same rule has been declared where a bequest was invalid under a statute rendering bequests to charitable corporations or uses void when made within a certain time before the testator's death. (*In re Schmidt*, 15 Mont. 117.) The devise to the mission society was void, not only because of the charter of the corporation and the laws of New York but also because the corporation was civilly dead and had no existence. There was therefore neither devise nor devisee of the remainder after the life estate, and the attempted devise of the remainder was a nullity and no part of the will.

Susan Elmore was not required to elect whether she would take the life estate, and thereby confirm the attempted devise, or claim her inheritance in the intestate property. In the case of *Ellis v. Dumond*, 259 Ill. 483, where it was held that the acceptance by the widow of the provision made for her in the will barred her right of dower not only in the estate disposed of by the will but also in intestate property which the testator acquired after the will was made but did not dispose of, the provisions for the wife were "made to her in lieu of her dower and all other rights as widow of my estate." There was no condition annexed to the devise of the life estate to Susan Elmore. The decision in the case referred to was also based on the provision of the Dower act that an acceptance of a provision made for a widow by a will bars her claim of dower in any of the lands of which the testator died seized, whether the same was devised by will or not.

The decree is affirmed.

Decree affirmed.

(No. 12830.—Decree affirmed.)

CLARE HARDING WEBER *et al.* Appellees, *vs.* BRUCE
THOMAS BRAK *et al.* Appellants.

Opinion filed October 27, 1919.

1. **DEEDS**—*intention of grantor determines delivery of a deed.* The intention of the grantor in a deed concerning the matter of delivery is the controlling element which determines whether the deed has been delivered.

2. **SAME**—*deed, to be delivered, must pass beyond grantor's control.* It is essential to the delivery of a deed that the deed pass beyond the grantor's control, and in determining whether the grantor intended a delivery the test is whether the deed remains in his control and is subject to his call.

3. **SAME**—*when grantor may retain deed in his possession.* The grantor may retain the deed in his possession in case of a voluntary conveyance and such retention will not destroy the effect as a deed in the absence of circumstances showing that it was not intended to be an absolute conveyance and operate as such; but where the grantor hands the deed to the grantee for safe keeping but not for the purpose of passing title there is no legal delivery.

4. **SAME**—*when delivery to third person passes title to grantee.* The delivery of a deed to a third person, who receives it as the grantor's agent without any direction to deliver to the grantee, does not pass title, but if it be given to a third person to be held for the grantee and is subsequently accepted by the grantee there is a good delivery.

5. **SAME**—*delivery of deed must be unconditional.* The delivery of a deed must be unconditional, and where the grantor delivers the deed to a third person upon the express direction that it shall not be delivered to the grantee unless the latter survives the grantor, the deed is intended to operate as a will and there is no valid delivery. (*Elliott v. Murray*, 225 Ill. 107, followed.)

• **APPEAL** from the Circuit Court of Logan county; the Hon. T. M. HARRIS, Judge, presiding.

CHARLES H. WOODS, guardian *ad litem*, for appellant
Bruce Thomas Brak.

W. A. COVEY, for appellant Joseph Brak.

HAROLD F. TRAPP, and LYMAN S. MANGAS, for appellees.

Mr. JUSTICE STONE delivered the opinion of the court:

This is an appeal from the decree of the circuit court of Logan county partitioning the land in question and setting aside a certain warranty deed made by Elizabeth Thomas to Emily Brak.

The only question involved in this case is whether or not the deed from Elizabeth Thomas to Emily Brak under date of August 31, 1911, was ever delivered in the lifetime of Elizabeth Thomas. The deed in question is the usual statutory form of a warranty deed, dated August 31, 1911, signed, sealed and acknowledged by Elizabeth Thomas before Louis C. Schwerdtfeger, a notary public. The usual certificate of a notary is attached to the deed and the seal of the notary impressed thereon. There is no question raised relative to the execution of the instrument, either in form or substance. The certificate of the notary is in the usual form. The deed was filed for record on March 17, 1916. Schwerdtfeger, the notary who acknowledged said instrument, died November 26, 1911, and Fred W. Longan was duly appointed executor of his estate. The executor found the instrument in question in the private box of Schwerdtfeger, sealed in a plain envelope, upon which was written the following inscription:

"*Elizabeth Thomas*
to
Emily Brak."

"This deed is to be held and not delivered until after the death of Mrs. Elizabeth Thomas. In the event Mrs. Emily Brak dies before her mother then this deed is to be returned to Mrs. Elizabeth Thomas."

This inscription was typewritten and bore no date and no signature was subscribed thereto. There is some testimony in the record that Schwerdtfeger, the notary public who acknowledged the deed, was at the time of the acknowledgment the president of a bank, and that in the pri-

vate room of said bank he did at times consult with Mrs. Thomas, and on or about the day on which the deed was executed he went to the home of Mrs. Thomas to execute some paper. After the death of Mrs. Thomas, Longan, the executor of the estate of Schwerdtfeger, delivered the envelope and deed in question to Mrs. Brak in the same condition in which he found it. Mrs. Brak opened the envelope, removed the deed and had the same recorded.

On August 31, 1911, the day on which the deed was executed and acknowledged, Mrs. Thomas was living on the farm in question and continued to live there until the time of her death, March 14, 1916. She had a life estate in about 90 acres of the land in question, in which her daughter, Mrs. Brak, had the estate in remainder, and the house in which they lived was on this 90-acre tract. As a part of this farm Mrs. Thomas also owned 60 acres in fee, on which there was a tenant house. This 60 acres is the land in question. With Mrs. Thomas there lived her daughter, Mrs. Brak, and her husband, Joseph Brak, and a son, Bruce Brak. Mrs. Thomas continued her relations with the premises after the execution of the deed the same as before. The evidence does not disclose any act showing a change of possession or use.

The complainants are the heirs-at-law of Mrs. Thomas other than Elizabeth Brak, who was made defendant. Mrs. Brak died after the filing of the bill and before taking testimony, and her legatees were then substituted as the proper parties defendant. The bill seeks the cancellation of the deed in question as a cloud upon the title on the sole ground that it was never delivered, and was intended to operate, if at all, on the death of the grantor, and was therefore void, and also seeks partition of the 60 acres of land in question among the heirs of Mrs. Thomas and the devisees of Mrs. Brak.

It is contended on behalf of the appellants that while the delivery of the deed in question is contingent, yet by

reason of the fact that the contingency on which it was to be returned to the grantor must necessarily take place during the life of the grantor, the grantee having survived her mother, the deed took effect as the present deed of the grantor and relates back to the first delivery.

The sole question in this case is whether or not there has been a delivery of this deed. Both sides here appear to admit that the superscription on the envelope is properly in evidence and both appear to rely upon it to sustain their claims. The intention of the grantor in a deed concerning the matter of delivery is the controlling element which determines whether the deed has been delivered. (*Hudson v. Hudson*, 287 Ill. 286; *Hoyt v. Northup*, 256 id. 604.) The test as to whether or not there is a delivery intended by the grantor rests in the question whether the deed remains in the grantor's control and is subject to his call. It is essential to a delivery that the deed pass beyond the grantor's control and beyond his call. (*Lange v. Cullinan*, 205 Ill. 365.) The grantor may retain the deed in his possession in case of a voluntary conveyance and such retention will not destroy the effect as a deed in the absence of circumstances showing that it was not intended to be an absolute conveyance and operate as such. (*Baker v. Hall*, 214 Ill. 364.) On the other hand, the fact that the grantor handed a deed to the grantee to be deposited in a box of the grantee for safe keeping but not for the purpose of passing title was held not to amount to a delivery. (*Bovee v. Hinde*, 135 Ill. 137.) So the delivery of a deed to a third person, who receives it as the grantor's agent, without any direction to deliver to the grantee, does not pass title, but if it be given to a third person to be held for the grantee and is subsequently accepted by the grantee such is a good delivery. (*Hoyt v. Northup*, *supra*.) If a deed be delivered to a third person with the intention that it shall become operative only upon certain contingencies there is no delivery. A delivery must be unconditional, unless in

escrow. There can be no partial delivery. *Otis v. Spencer*, 102 Ill. 622; *Russell v. Mitchell*, 223 id. 438; *Stinson v. Anderson*, 96 id. 373.

In the case of *Elliott v. Murray*, 225 Ill. 107, the grantor made a deed of certain lands to her husband, which was turned over to him with the understanding that he was to record the same in the event she died before he did, and that in case of his death preceding hers she was to destroy the deed. The deed was kept in a box at the bank under the control of the grantee. Both grantor and grantee died as the result of injuries received in the burning of the Iroquois Theater, in the city of Chicago, the grantor dying at the time of such injuries and the grantee dying two days later. In that case it was said: "The question of delivery is a mixed question of law and fact, and it is held that the delivery of a deed may be made by acts alone,—that is, by doing something and saying nothing; or by words alone,—that is, by saying something and doing nothing; or it may be delivered by both acts and words. It must, however, be delivered by something answering to the one or the other, or both, and with the intent thereby to give effect to the deed. (*Rountree v. Smith*, 152 Ill. 493.) In the case at bar the deed was handed to Charles S. Owen by Mr. Lewis, and after it had been signed and acknowledged by Mrs. Owen was placed by Owen in his private box, where it remained until after his death. If these were the only facts which appeared in evidence bearing upon the question of delivery it might well be held that the deed had been delivered. It appears, however, that the deed was made, not with the intention that it should immediately take effect and pass title to said farm to Charles S. Owen but that it should only take effect in case Charles S. Owen survived his wife, and in the event that his wife should survive him it was never to take effect but was to be destroyed. A deed must take effect immediately upon its execution and delivery to the grantee or it will not take effect

at all. (*Wilson v. Wilson*, 158 Ill. 567; *Wilenou v. Handlon*, 207 id. 104.) We think it clear that the parties to this deed intended it to operate as a will, and that the possession of the deed by Charles S. Owen did not have the effect to vest the title to said farm in him."

The above case is very similar to the case at bar. It appears that the understanding in the *Elliott case* was practically identical with the superscription on the envelope in the instant case, the only difference being that in the *Elliott case* the grantee had possession of the deed while in the case at bar the deed remained in the possession of Schwerdtfeger. It is evidenced from the language of the superscription that it was intended the deed in question should operate as a will. The delivery was made contingent upon the grantee surviving the grantor. It is a fair presumption from the evidence that if the superscription was made at the direction of either it was at the grantor's direction and not at the direction of the grantee, and constituted a direction as to what should be done with the deed in case the contingency therein named did not transpire. In any event, it was the condition on which the deed was placed in the hands of the notary. That condition was that the grantee must survive the grantor in order that the title pass, and it is evident that it was intended that unless that condition be fulfilled there was to be no conveyance. This intention is further borne out by the fact that the grantor continued in possession and use and received the income from the land in question until the day of her death. There was no apparent change in the character of her possession or control.

Applying the rules hereinbefore referred to, we are of the opinion that there was no delivery in this case, and that the title, therefore, did not pass to Emily Brak, and that the chancellor did not err in so holding.

The decree of the circuit court will therefore be affirmed.

Decree affirmed.

(No. 12103.—Appellate Court reversed; municipal court affirmed.)

THE ILLINOIS SURETY COMPANY, Plaintiff in Error, *vs.*

FAYETTE S. MUNRO, Defendant in Error.

Opinion filed October 27, 1919.

1. **GUARANTORS**—*when plaintiff does not lose benefit of contract of guaranty by alleging it to be one of indemnity.* Where a plaintiff, suing on a contract of guaranty, attaches to his statement of claim the obligation which the defendant signed and on which suit is brought, he does not lose the benefit of the contract by calling it, in his affidavit, a contract of indemnity.

2. **SAME**—*to stand back of an agreement is a contract of guaranty.* A contract of guaranty is an undertaking to be responsible for the performance of an obligation of a third person upon his failure to perform it, and an agreement to “stand back of any obligation” which the principal may incur in a certain matter is a promise to pay if the principal debtor does not, and is a guaranty contract.

3. **SAME**—*guarantor is liable only according to terms of his contract.* The statute requiring the assignee of a promissory note, before suing his assignor, to prosecute the maker to insolvency, does not apply to a general contract of guaranty, as a guarantor may impose any terms or conditions in his guaranty which he may choose and will only be liable to the holder according to the terms of the agreement.

4. **SAME**—*holder of guaranty is not bound to institute legal proceedings against debtor.* While a guarantor may be entitled to require demand of performance to be made on the principal debtor and notice of his default to be given to the guarantor, yet the holder of the guaranty is not bound to institute any legal proceedings against the debtor unless this is required by the terms of the guaranty.

5. **SAME**—*surety on bond required by statute is bound by judgment in accordance with statute—process.* A party who is surety on a bond required by statute is bound by a judgment on the bond in accordance with the terms of the act, and where an act requiring a bond for costs provides that in case of a recovery in the suit in which the bond is given judgment shall be rendered against the principal and surety in the bond, such a judgment is valid although there is no service of process on the surety or appearance by him in the case.

6. **SAME**—*items taxed as costs cannot be questioned in collateral suit against surety.* In an action by a surety company against

a guarantor who had agreed to "stand back of any obligation" which his principal might incur through securing a cost bond from the company in a suit the principal was prosecuting, the question whether certain items were properly charged as costs in such suit cannot be raised by the guarantor, who is bound by the judgment for costs against the principal until that judgment is reversed in a direct proceeding.

WRIT OF ERROR to the Second Branch Appellate Court for the First District;—heard in that court on appeal from the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding.

A. J. HOPKINS, for plaintiff in error.

BOWEN W. SCHUMACHER, for defendant in error.

Mr. CHIEF JUSTICE DUNN delivered the opinion of the court:

The plaintiff in error recovered a judgment in the municipal court of Chicago against the defendant in error which the Appellate Court reversed without remanding, and the record has been brought before us for review by a writ of *certiorari*.

The defendant in error signed a letter addressed to the secretary of the plaintiff in error, as follows:

"DEAR SIR—This will introduce Mr. Edward F. Rice, who desires to get a cost bond in the Federal court, and this firm will stand back of any obligation which Mr. Rice may incur in this behalf.

"Very truly yours,

VROMAN, MUNRO & VROMAN."

The name signed to the letter was that of a firm of lawyers of which defendant in error was a partner. Rice took the letter to the plaintiff in error and upon his application the plaintiff in error executed the cost bond, and it was filed in the case in the district court of Wyoming, in which Rice was complainant. The plaintiff in error by the bond acknowledged itself bound to pay or cause to be paid all costs which might accrue in the action, either to the

opposite party or to any of the officers of the court. Rice died. The court ordered the plaintiff in error to pay the costs taxed in the cause, including attorney's fees, receiver's compensation and expenditures, amounting altogether to \$1565.14, and no effort having been made to revive the suit, ordered it dismissed. Plaintiff in error through its attorney made a motion to have the costs re-taxed, but the court denied the motion. The plaintiff in error having obtained a release of the attorney's fees taxed in the decree, amounting to \$400, paid the residue of the costs and brought this suit for the amount paid and interest and for attorney's fees and expenses incurred in the endeavor to procure the re-taxation of costs. The plaintiff in error filed a second amended statement of claim, in which it stated that the claim was for damages for breach of an indemnity agreement, a copy of which is attached to the claim. A copy of the letter which has been set out was attached as an exhibit to the claim. The defendant in error filed an affidavit of merits, which was stricken, except a statement that the attorney's fees claimed were unreasonably large.

The defendant in error insisted in the Appellate Court, as he does here, among other things, that his contract was not one of indemnity but was a contract of guaranty,—a collateral undertaking guaranteeing Rice's performance of his obligation to the plaintiff in error; that the defendant in error's liability was not original, direct or primary but only secondary, and that it was not shown that any effort had been made to collect from Rice's estate. The Appellate Court sustained this contention, holding that the liability of the defendant in error upon his contract, if any, was secondary, and that the plaintiff in error having alleged the contract to be one of indemnity, and the trial court having rendered judgment on that theory, the judgment should be reversed. No finding of fact was made by the Appellate Court but the judgment was reversed without remanding.

It is true that the plaintiff in error's affidavit states that its claim is for damages for a breach of an indemnity agreement and charges that the defendant indemnified the plaintiff, but attached to its claim was the obligation which the defendant in error signed, and if there was a contract of guaranty the plaintiff in error did not lose the benefit of it by calling it a contract of indemnity. The letter stated that Rice desired a cost bond and the writer would stand back of any obligation which Rice might incur in this behalf. There is no doubt about the meaning of the letter. The defendant in error bound himself to stand back of any agreement which Rice should make with the plaintiff in error, for the purpose of procuring the plaintiff in error to execute a cost bond. To stand back of an agreement implies that Rice was to stand first, and that in case of his default of performance the defendant in error would perform the contract. The obligation which Rice incurred was to pay an annual premium of \$10, to furnish evidence of no further liability on the bond at the termination of the suit, and to reimburse the plaintiff in error for all loss, costs, charges, suits, damages, counsel fees and expenses which it should sustain and incur in consequence of having executed the bond. The defendant in error's promise to stand back of this obligation amounted to a promise to perform it if Rice did not, and was a guaranty, which is an undertaking to be responsible for the performance of an obligation of a third person upon his failure to perform it. In some cases of guaranty the guarantor is entitled to notice, within a reasonable time, that the guaranty has been accepted, and in case of default of the principal debtor reasonable notice of such default, but no such question arises here, and no claim is made that the defendant in error did not have notice of the execution of the bond on the faith of his guaranty and of the default of the principal.

The defense which was relied on was that the plaintiff in error made no effort to collect from the principal's estate.

It was under no obligation to do so under the circumstances of this case. A guarantor may impose any terms or conditions in his guaranty which he may choose and will only be liable to the holder according to the terms of the agreement. If he guarantees payment unconditionally and payment is not made then he is liable on his guaranty. If he guarantees the collection of a sum of money, then he is only liable in case the holder of the guaranty is unable to collect it by legal process. Under our statute making the assignor of a promissory note liable to the assignee in case the latter was unable to collect the note of the maker at maturity, in order to recover the assignee was required to show that he had prosecuted the maker to insolvency, or that a suit at the maturity of the note would have been wholly unavailing, or that the maker had absconded from the State. This statute had no reference to the contract of guaranty, which depends upon different principles, and upon a guaranty of the payment of a note by the assignor the holder had a right to recover of the guarantor without pursuing the maker. (*Hance v. Miller*, 21 Ill. 636; *Penny v. Crane Bros. Manf. Co.* 80 id. 244.) The defendant in error having unconditionally guaranteed that Rice would reimburse the plaintiff in error, his liability did not depend upon Rice's solvency or insolvency but he was absolutely bound to make good Rice's default. While a guarantor may be entitled to require demand of performance to be made on the principal debtor and notice of his default to be given to the guarantor, yet the holder of the guaranty is not bound to institute any legal proceedings against the debtor unless this is required by the terms of the guaranty. (*Douglass v. Reynolds, Byrne & Co.* 7 Pet. 113.) It was not necessary that the plaintiff should either state or prove that it had prosecuted any legal remedy against Rice.

The defendant in error insists that the decree of the district court of Wyoming adjudging the costs against the plaintiff in error was of no effect against Rice's estate, and

there could be no liability upon the defendant in error because nothing could be established against Rice. His argument is, that after Rice's death his suit abated and there could be no judgment for costs for which his estate would be liable. When the plaintiff in error executed the bond it did so with knowledge that the practice of the district court in which the bond was filed was regulated by that court, and that an order for the payment of costs might be entered against the security for costs in accordance with the rules of the court. A judgment rendered against a surety on a bond given under a statute which provides that in case of a recovery in the suit in which the bond is given judgment shall be rendered against the principal and surety in the bond is valid though there was no service of process on the surety or appearance by him in the case. The statute entered into the bond, and its execution amounted to a consent to the entry of a judgment in accordance with the statute, which would be binding on the surety. (*Johnson v. Chicago and Pacific Elevator Co.* 105 Ill. 462.) By executing the cost bond and permitting it to be filed the plaintiff in error submitted to the jurisdiction of the court in the case in which Rice was complainant. The court thus had personal jurisdiction of the plaintiff in error, and having jurisdiction of the subject matter, its order, whether erroneous or not, was not void. The defendant in error cannot attack the judgment, for whether or not it was binding on Rice it was binding on the plaintiff in error unless reversed, and the plaintiff in error was required to pay, and did pay, the amount. Rice by his agreement had promised to reimburse plaintiff in error for all the damages and expenses it might incur, and the defendant in error having agreed to stand back of Rice's obligation was bound to reimburse the plaintiff in error.

The defendant in error also argues that the guarantor could be held liable for attorney's fees only on his express promise, and that the receiver's fees and expenses are not

proper items to be charged as costs. The obligation of Rice which the defendant in error guaranteed required him to reimburse the plaintiff in error for damages, counsel fees and expenses of every kind which plaintiff in error might be required to pay by reason of having executed the bond. Whether the attorney's fees and receiver's costs and expenses were proper to be taxed was a question which the district court was called on to decide, and its order, until reversed, cannot be disregarded.

The judgment of the Appellate Court will be reversed and that of the municipal court affirmed.

Judgment of Appellate Court reversed.

Judgment of municipal court affirmed.

(No. 12800.—Reversed and remanded.)

VINNEY LEMONT SCHMIDT, Appellee, vs. JACOB GLOS,
Appellant.

Opinion filed October 27, 1919.

1. REGISTRATION OF TITLE—*when purported copies of abstracts of title should not be admitted in evidence.* Where purported copies of abstracts of title are offered in evidence in a proceeding to register title the copies must contain a certificate or signed statement of the maker that they are true copies of the originals, and the mere words "a true copy," above the signature of the maker of the copies, is not such a certificate or statement as will satisfy the statute and render the copies admissible.

2. SAME—*applicant must prove premises were vacant when application was filed.* In a proceeding to register title the allegation that the land is vacant is material, and the applicant is required to prove that the premises were vacant when the application was filed.

APPEAL from the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding.

JOHN R. O'CONNOR, and ALBEN F. BATES, for appellant.

S. C. IRVING, for appellee.

Mr. CHIEF JUSTICE DUNN delivered the opinion of the court:

The circuit court of Cook county made a decree for the registration of the title in fee simple to certain real estate in Vinney LeMont Schmidt and set aside a tax deed to Jacob Glos, who has appealed.

The applicant offered in evidence copies of abstracts of title, which were received over the appellant's objection. The copies purported to be examinations of title made at various dates, bearing the signature "Haddock, Vallette & Rickcords." This signature was not the genuine or original signature of that firm but was typewritten, and at the end of the instrument appeared these words: "A true copy.—Real Estate Title and Trust Company, by Edward E. Shaw, Second V.-Prest." The dates of the examinations were February 20, 1890; April 11, 1890; April 19, 1890; March 22, 1892. The only proof offered in connection with the abstracts was evidence of the genuineness of the signatures of the Real Estate Title and Trust Company that it was engaged in the business of making abstracts for hire in Cook county, and that Haddock, Vallette & Rickcords were reputed to be in the business of making abstracts for hire on the various dates named in the examinations of title. The only date appearing on the abstracts was that of the original examinations. There was no evidence that the Real Estate Title and Trust Company was engaged in the business of making abstracts at any of those dates. Section 18 of the Torrens law authorizes the examiner to receive in evidence any abstract of title, or a certified copy thereof, issued in the ordinary course of business by makers of abstracts, and provides that it shall be sufficient proof that any original abstract of title was made or issued in the ordinary course of business by makers of abstracts to show that the signature attached to the abstract is the genuine signature of the person, firm or corporation purporting to make or issue the same, and that such maker

was known or generally reputed to have been in the business of making abstracts of title for hire at the date shown upon the abstract or the actual date of the issuance thereof. In regard to certified copies it is provided that the certificate or signed statement of the maker of such copy of any purported original abstract that the same is a true copy of the original abstract or examination of title shall be sufficient evidence *prima facie* of the correctness of such copy. These copies contain no certificate or signed statement of the maker that they are true copies of original abstracts or examinations of title. The words "a true copy" are not equivalent to such certificate or statement. Furthermore, no evidence was offered to establish the existence and execution of the original examinations of title. (*Brummel v. Glos*, 278 Ill. 552.) It was error to admit these copies in evidence.

The application stated that the land was vacant. It was filed on May 10, 1917. The only evidence on the question of the occupancy of the property is that of the surveyor who visited the premises on December 23, 1918, and this had no tendency to prove that they were vacant on the day the application was filed. Under the statute the allegation that the land is vacant is material and the applicant is required to prove it. *Harty v. Glos*, 272 Ill. 395.

The appellant bought the land at a sale for taxes on September 12, 1913, for \$10.19, paying subsequent taxes on September 16, 1914, \$11.55, and on July 21, 1915, \$10.99; for recording the certificate of sale 80 cents; for the issuance of the tax deed 80 cents, and recording 75 cents. These items, with interest, amount to more than \$40, and yet the decree only required the appellee to pay the appellant \$28.93 as the condition for setting aside the tax deed. This also was error.

The decree will be reversed and the cause remanded for a new hearing.

Reversed and remanded.

(No. 12597.—Judgment affirmed.)

WASHINGTON J. WOODWORTH, Defendant in Error, *vs.*
FREDERICK BECK & Co. *et al.*—(CHARLES R. BAUER-
DORF, Plaintiff in Error.)

Opinion filed October 27, 1919.

DEBTOR AND CREDITOR—*when assignment, absolute on its face, is fraudulent as to creditors.* Where a creditor of a corporation seeks to garnishee certain debtors of the corporation, an assignment of said debtors' accounts, although absolute on its face, is fraudulent as to creditors where it is made to secure loans by stockholders of the corporation a few days before the corporation filed its voluntary petition in bankruptcy, and the assignment will not be enforced in favor of the assignee who has filed an intervening petition after being made a defendant in the garnishment proceeding.

WRIT OF ERROR to the First Branch Appellate Court for the First District;—heard in that court on appeal from the Municipal Court of Chicago; the Hon. JOHN RICHARDSON, Judge, presiding.

CULVER, ANDREWS, KING & STITT, for plaintiff in error.

EDWARD L. ENGLAND, for defendant in error.

Mr. JUSTICE FARMER delivered the opinion of the court:

Washington J. Woodworth sued Frederick Beck & Co., a New York corporation, in the municipal court of Chicago for money claimed to be due him from the defendant for salary and commission. At the same time he caused to be issued an attachment in aid. Summons was served on a number of debtors of the defendant as garnishees. The amount plaintiff claimed to be due him from the defendant was \$2259.57. The affidavit in attachment alleged the defendant was a non-resident of this State and was about to remove its property in the State of Illinois from the State; that it had fraudulently conveyed its property, or part thereof, and had within two years concealed or dis-

posed of its property so as to delay and hinder its creditors. On the day suit was commenced defendant was adjudged a bankrupt by the New York courts. The garnishees answered, admitting their indebtedness to Beck & Co. but alleging the accounts had, before the garnishees were served with garnishee summons, been assigned by the defendant to Charles R. Bauerdorf and notice of such assignment was given the garnishees by Bauerdorf. The trustee in bankruptcy and Bauerdorf were made parties defendant, but the former did not appear or make any claim to the funds. Bauerdorf filed an intervening petition, claiming the accounts owing by the respective garnishees by virtue of an assignment of said accounts made to him by Beck & Co. for a valuable consideration, as collateral security for a loan of \$51,000 made by various parties to Beck & Co., and that each of the garnishees had been notified by the intervening petitioner of such assignment before suit was commenced. Plaintiff in attachment answered the intervening petition, alleging the assignment was without consideration, fraudulent and void and was made for the purpose of placing the property beyond the reach of creditors. The cause was heard by the court without the intervention of a jury, and the court made the following finding of fact: "The court finds the issues as to the claim to the funds in the hands of the garnishees in favor of the plaintiff and the right to said fund is in said plaintiff," and rendered judgment accordingly in favor of the plaintiff and against the interpleader for costs, from which judgment the intervening claimant appealed to the Appellate Court. That court affirmed the judgment and this court granted a petition for *certiorari*.

The plaintiff in error introduced in evidence an assignment by Beck & Co. of accounts aggregating \$56,540.03 to Charles R. Bauerdorf as substitute trustee for Rudolph J. Shaffer and the estate of Charles F. Bauerdorf. The assignment was dated March 2, 1916, and recited a consider-

ation of \$51,000, and authorized Charles R. Bauerdorf to collect and receive payment of the accounts. The assignment recited it was given to take the place of prior assignments made by Beck & Co. to Charles F. Bauerdorf as trustee, and upon his death to Charles R. Bauerdorf as substitute trustee. The first assignment of accounts was to secure loans amounting to \$41,000, alleged to have been made by the heirs of Frederick Beck, who was a stockholder in Beck & Co. but who died prior to the time the loans and assignments were made. The payees in the notes secured by the assignment were stockholders in Beck & Co. The first assignment was made in September, 1914, but the accounts assigned were collected by Beck & Co. No notice was given the debtors of the assignment of the accounts prior to the assignment of March 2, 1916. After that assignment notice was given the persons owing the accounts, and such of them as were paid were collected by Bauerdorf. The last assignment is in substantially the same form as the previous ones, and purports to be a substitution of other accounts to secure the same indebtedness and an additional \$10,000. Seven days after the last assignment Beck & Co. filed its voluntary petition in bankruptcy in the State of New York and was adjudged a bankrupt. The assignment, while absolute on its face, was in fact only made as security and was constructively fraudulent as to creditors and its enforcement contrary to the policy of the laws of this State. *Beidler v. Crane*, 135 Ill. 92; *Clark v. Harper*, 215 id. 24; *Woodward v. Brooks*, 128 id. 222; *Edwards v. Schillinger*, 245 id. 231.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(No. 12724.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs. GEORGE BINGER, Plaintiff in Error.

Opinion filed October 27, 1919.

1. CRIMINAL LAW—*when record shows indictment was returned into open court.* The circuit court record shows that an indictment was returned into open court by the grand jury where the record shows that the return of the indictment was a part of the report of the grand jury made in open court, a full panel being present.

2. SAME—*Supreme Court will not weigh credibility of witnesses whose testimony is conflicting.* The Supreme Court will not sustain a conviction on a criminal charge when the evidence is improbable, unsatisfactory or reasonably doubtful, but it will not substitute its judgment for that of a jury in merely weighing the credibility of witnesses, where the testimony is conflicting.

WRIT OF ERROR to the Circuit Court of Menard county;
the Hon. GUY R. WILLIAMS, Judge, presiding.

H. W. MASTERS, for plaintiff in error.

EDWARD J. BRUNDAGE, Attorney General, HENRY E. POND, State's Attorney, and SUMNER S. ANDERSON, (J. M. SMOOT, and J. L. LANING, of counsel,) for the People.

Mr. JUSTICE FARMER delivered the opinion of the court:

Plaintiff in error was indicted at the February term, 1917, of the Menard county circuit court for the crime of incest. Two indictments were returned, one charging the crime was committed November 25, 1914, and the other charging the same crime with the same prosecutrix was committed March 8, 1916. A trial was had under the last named indictment. The prosecutrix testified to three acts of sexual intercourse with plaintiff in error,—one November 25, 1914, one November 8, 1915, and one March 8, 1916. At the conclusion of the testimony, the court, on motion of

plaintiff in error, ruled the prosecution to elect which act would be relied on for a conviction, and the act of March 8, 1916, was elected. The jury returned a verdict finding plaintiff in error guilty. Plaintiff in error moved for a new trial and in arrest of judgment. Both motions were overruled and judgment rendered on the verdict, sentencing the plaintiff in error to the penitentiary. He has sued out a writ of error to review the judgment.

The errors assigned and argued are that the court erred in overruling the motion in arrest of judgment because the record does not show the indictment was returned into open court by the grand jury, that the evidence was not sufficient to justify the verdict, and that the court committed reversible error in giving People's instruction No. 5.

In support of the claim that the court erred in overruling the motion in arrest plaintiff in error relies on the record as it is written in volume "G" of the circuit court records. On page 261 the record recites that February 7, 1917, the court convened pursuant to adjournment; that the grand jury came into open court, a full panel being present, "and present the following" to the presiding judge. Then follows a report on the condition of the jail, consisting of three and a half lines, signed by the foreman, and immediately following on the next page, with no change of date and clearly as a part of the report, appear two cases entitled *People vs. George Binger, Incest*. One is No. 722, the other No. 723, and following the title of each one the record reads, "The grand jury report indictment indorsed 'a true bill.'—H. J. Marbold, foreman," bail fixed, *capias* ordered and continued by consent. The return of the indictment was a part of the report of the grand jury made in open court, a full panel being present, the record of which report begins on the page preceding that on which the return of the indictment is shown. The record shows the indictment was returned into open court by the grand

jury. *Gahan v. People*, 58 Ill. 160; *Kelly v. People*, 132 id. 363; *People v. Dennis*, 246 id. 559.

Instruction No. 5 given on behalf of the prosecution was as follows:

"The court instructs the jury that if you believe that any witness or witnesses has or have willfully or corruptly sworn falsely as to any material fact in issue in this case, you have the right to disregard the entire testimony of any such witness or witnesses except in so far as such witness or witnesses may have been corroborated by the evidence of other credible witnesses or by facts and circumstances appearing in evidence."

It does not appear that the correctness of the instruction was challenged in the motion for a new trial, and the action of the court in giving it is complained of for the first time in this court. At all events there was no substantial inaccuracy in the instruction.

We come now to the question of the sufficiency of the evidence. It is argued with much earnestness by counsel for plaintiff in error that the evidence did not warrant the verdict and the judgment. On account of the deplorable nature of the case and the revolting character of the testimony we feel justified in not setting out the substance of the evidence. The plaintiff in error is a half-brother of the mother of the prosecuting witness, she therefore being his niece of the half blood. The prosecutrix was born in 1898 and was sixteen years old at the time she testified the first act of sexual intercourse occurred between her and plaintiff in error, in November, 1914. The last act she testified occurred March 8, 1916. Plaintiff in error was a single man and at the time of the trial was thirty-seven years of age. Plaintiff in error, his mother and unmarried sister lived together on a farm. The prosecutrix lived with her parents on a farm about a half mile distant from plaintiff in error. The prosecutrix testified she had twice become pregnant by plaintiff in error; that she had a premature

birth July 2, 1915, and a miscarriage in July, 1916. Her last pregnancy resulted from the act of intercourse with plaintiff in error on March 8, 1916. It is apparent from the testimony that the prosecutrix became the subject of some gossip in the neighborhood, and there was some talk about her having been delivered prematurely of a child, which was buried on the farm plaintiff in error was residing on. Plaintiff in error had made statements that the brother of the prosecuting witness was the author of her trouble, and he testified on the trial that such was the fact and that he had twice discovered them in the act. The plaintiff in error and the prosecutrix's brother and other members of her family had had some trouble prior to the fall of 1916. At that time,—the fall of 1916,—he and a brother of the prosecutrix had an altercation which grew out of some dispute over money matters and also the charge made by the plaintiff in error against prosecutrix and her brother, during which altercation prosecutrix's brother shot and wounded plaintiff in error. The brother was arrested on a charge of assault to commit murder, and at the preliminary hearing the prosecuting witness testified as to her relations with the plaintiff in error. She claims to have previously informed her mother of it. It was after this preliminary hearing that the indictment was returned in this case.

Counsel for plaintiff in error argues with some plausibility and much earnestness that the prosecuting witness is shown by her testimony to be unreliable and untruthful, and that the motive for making the charge against plaintiff in error was to help her brother to escape conviction on the charge of assaulting and shooting the plaintiff in error. Some things in the story told by the prosecutrix, it must be admitted, cast doubt on her entire truthfulness, but the same is also true of the testimony of plaintiff in error, who emphatically denied he had ever sustained illicit relations with the prosecutrix. The jury were warranted by the evi-

dence in concluding she had sustained such relations with some man, and aside from the testimony of the plaintiff in error there was no proof to cast suspicion upon anyone else than plaintiff in error. We are impressed from an examination of the testimony that he was no more worthy of belief than the prosecutrix. It was a question of the credibility of witnesses and the weight to be given their testimony. The proof for the prosecution, if believed, sustained the verdict. It is to be expected that persons who would commit the crime charged in the indictment would not be of high character or possess a high, or even average, degree of mentality. That human beings could be guilty of such an offense seems almost incredible to right-minded people, but that, alone, would not warrant an acquittal of one charged with such a crime, for we know that such offenses do occur. There was that in the testimony of the plaintiff in error which cannot but cast suspicion upon his credibility, and, as we have before stated, the same is true also of some of the story told by the prosecutrix. This court will not sustain a conviction on a criminal charge when the evidence is improbable, unsatisfactory or reasonably doubtful, but it will not substitute its judgment for that of a jury in merely weighing the credibility of witnesses, where the testimony is conflicting. *People v. McCann*, 247 Ill. 130; *People v. Connors*, 246 id. 9; *People v. Feinberg*, 237 id. 348; *People v. Horchler*, 231 id. 566.

There is nothing in the record to indicate that anything occurred on the trial to excite the passion and prejudice of the jury, and no charge of that kind is made. If the story told by the prosecutrix was true and the jury believed it, the verdict was warranted. It was not if the story told by the plaintiff in error was believed by the jury. The prosecutrix and the defendant only know the absolute truth, but some other testimony had a tendency to corroborate or contradict both. It was peculiarly a case depending on the credibility of the witnesses and the weight to be given

their testimony, and we would not be authorized to reverse the judgment because the jury believed the testimony for the prosecution and based their verdict thereon.

The judgment is affirmed.

Judgment affirmed.

(No. 12665.—Reversed and remanded.)

THE KEYSTONE STEEL AND WIRE COMPANY, Plaintiff in Error, vs. THE INDUSTRIAL COMMISSION *et al.*—(S. F. McGRATH, Admr. Defendant in Error.)

Opinion filed October 27, 1919.

1. WORKMEN'S COMPENSATION—*appointment of administrator by probate court cannot be attacked in compensation proceeding.* Under a proper state of facts the probate court has jurisdiction to appoint an administrator of a deceased employee on the application of a creditor, and the authority of the administrator to act cannot be questioned collaterally in a proceeding by the administrator under the Workmen's Compensation act.

2. SAME—*when the fact that beneficiaries are living is not sufficiently proved.* Where an administrator, who has been appointed on the application of a creditor and who does not represent the beneficiaries, makes application for compensation for the death of an employee, who had left his home in the old country and had no dependents here, the existence of the alleged beneficiaries is the foundation of the right of action, and any presumption that may arise from the fact that the deceased left his mother and wife living before he came to this country some years before the accident is not sufficient to prove that the beneficiaries are still living.

3. PRESUMPTIONS—*when a person is presumed to be dead.* If a person is absent from his usual place of abode and no intelligence has been received from him within seven years and no account can be given of him there is a rebuttable presumption that he is dead, but there is no presumption, either of law or fact, as to what time during the period of seven years the death occurred or that the person lived during any particular portion of the period.

4. SAME—*when a person is presumed to be living.* There is a presumption of fact, based on common experience, as to the continuance of life and which justifies a conclusion that a person is alive shortly after he has been proved to be living, but the presumption has greater or less force, according to the circumstances.

WRIT OF ERROR to the Circuit Court of Peoria county;
the Hon. JOHN M. NIEHAUS, Judge, presiding.

GALLAGHER, KOHLSAAT & RINAKER, (THOMAS C. ANGERSTEIN, and O'HERN & O'HERN, of counsel,) for plaintiff in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Drajutin Stanovich, a Servian, who in this country was called Dan Stona and was an employee of the plaintiff in error, the Keystone Steel and Wire Company, was killed on August 19, 1915, by an accident arising out of and in the course of his employment. Sheldon F. McGrath, the defendant in error, was appointed administrator of his estate and made application to the Industrial Board for compensation. There was a hearing before an arbitrator, who made an award of \$8.25 per week for a period of 416 weeks from the date of the accident. On a review by the Industrial Board and a hearing of further evidence the award was approved, and on a writ of *certiorari* from the circuit court of Peoria county the writ was quashed and the decision of the board confirmed, and the court certified that the cause was one proper to be reviewed by this court.

Dan Stona came from Servia in 1912, leaving his mother, Stanka Stanovich, and his wife, Rada Stanovich, at Mokrin, in that country. The administrator was appointed on the application of a creditor, to whom Stona was indebted to the amount of \$30, and his appointment was without authority, request or knowledge on the part of the alleged beneficiaries. The administrator was not the public administrator and there was no property of the deceased, the only purpose of the appointment being the recovery of compensation. There was no evidence that either the mother or wife was living after November, 1912, and Servia was in a state of war and overrun by hostile armies.

The plaintiff in error objected to the letters of administration and to the authority of the administrator to act, and the objection was overruled. It was a collateral attack on the order of the probate court, which by statute has jurisdiction to appoint an administrator and under a proper state of facts may make an appointment on the application of a creditor. The probate court having jurisdiction the order of appointment was not void, whether erroneous or not, and could not be questioned collaterally in this proceeding.

The basis of the claim for compensation was that Dan Stona had a mother and wife living in Servia to whose support he had contributed within four years preceding the date of the accident, and proof of the existence of the alleged beneficiaries was the first essential to the recovery of compensation. The award of the arbitrator was filed on December 9, 1915, and the decision of the Industrial Board was made on November 1, 1916. The arbitrator and the Industrial Board based the finding of the existence of the beneficiaries on a supposed presumption of law that if the mother and wife were living in November, 1912, they were still living at the time of the hearing and decision. As a matter of public policy, in order that there may be a fixed rule regulating rights depending upon the death of a person, the law has established a rebuttable presumption that if a person is absent from his usual place of abode and no intelligence has been received from him within seven years and no account can be given of him, he is presumed to be dead. (*Johnson v. Johnson*, 114 Ill. 611; *Reedy v. Millizen*, 155 id. 636; *Policemen's Benevolent Ass'n v. Ryce*, 213 id. 9.) There is no presumption, either of law or fact, at what time during the period of seven years the death occurred or that the person lived during any particular portion of the period. There is a presumption of fact, based on common experience, as to the continuance of life, and having greater or less force according to varying circumstances, which justifies a conclusion of fact that a person

is alive shortly after he has been proved to be living. The existence of the alleged beneficiaries lying at the very foundation of the right to compensation, it should not rest only on a mere presumption advanced by one who does not represent them and has heard nothing from them but only knows that they were living some years before the accident. There was a witness who testified to the handwriting of a letter to Dan Stona from his wife, but it was without date, and the witness said that the envelope, which was not produced and perhaps would have shown when it was written, was in the possession of the attorney of the administrator. The fact that the beneficiaries were still living was not sufficiently proved.

It was necessary to prove that Dan Stona had contributed to the support of his mother and wife within four years before the accident. The evidence was that the mother and wife were living, at last accounts, at Mokrin, Servia, with two unmarried brothers of Stona. A witness testified that the mother told him in November, 1912, that she had received \$100 from Stona, but he did not see the post-office order or money order, and that testimony was stricken out, but the board apparently considered the testimony of a witness who said that Stona told him he had sent \$50 to the old country through the mail from the Peoria post-office, which was equally objectionable. That witness also said that in October, 1913, he went with Stona to the post-office at Keokuk, Iowa, and loaned him \$50, and Stona had \$110 and got a post-office money order with the money and posted a letter enclosing the order to his mother directly to Neyotin, Mokrin, Servia. It was certified by the third assistant postmaster general that no foreign money order was issued from the post-office at Peoria or Keokuk to Dan Stona or Drajutin Stanovich from January 1, 1911, to August 31, 1915.

It is objected that the testimony of the witness that Stona procured a money order at the Keokuk post-office

was not the best evidence, but inasmuch as the judgment must be reversed for the reason already given and the board may be called upon to consider further evidence concerning contributions to support, the question of the sufficiency of the proof on that subject will not now be considered.

The judgment of the circuit court is reversed and the cause is remanded to that court, with directions to remand the application to the Industrial Commission for any further proof that may be offered.

Reversed and remanded, with directions.

(No. 12488.—Judgment reversed.)

THE DIAMOND LIVERY, Plaintiff in Error, vs. THE INDUSTRIAL COMMISSION *et al.*—(CHARLES E. POOLE, Defendant in Error.)

Opinion filed October 27, 1919.

WORKMEN'S COMPENSATION—*when employment is casual.* Occasional, irregular or incidental employment is a "casual employment" as that term is used in section 5 of the Workmen's Compensation act of 1913, and a person who stays at a livery stable and is occasionally employed to make trips when regular employees are not available, for which service he receives a per cent of the money earned on the trip, but who is not on the pay-roll, is engaged in a casual employment.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. OSCAR M. TORRISON, Judge, presiding.

ALBERT N. POWELL, for plaintiff in error.

CHARLES C. SPENCER, for defendant in error.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

This is a writ of error sued out by the Diamond Livery, plaintiff in error, to review a judgment of the circuit court of Cook county affirming an award of the State In-

dustrial Commission in favor of Charles E. Poole, the circuit court having certified that the cause is one proper to be reviewed by this court.

Plaintiff in error had for many years operated a business in Chicago where it boarded the horses and sheltered the vehicles owned and used by Carson, Pirie, Scott & Co., Marshall Field & Co., Siegel, Cooper & Co., and many other firms of the city of Chicago. It furnished all accommodations, such as feeding, stalling and cleaning the horses, cleaning the wagons and harness, hitching and unhitching the horses and storing the wagons. The owners of the horses and wagons employed their own drivers, delivery boys and other helpers. The several firms paid the plaintiff in error for this service. Twelve or fifteen men were employed by plaintiff in error and were carried on the pay-roll. In addition to this boarding service the plaintiff in error owned some horses which it rented to merchants for \$1.50 a day for use on wagons owned by the merchant and driven by the merchant's employee. When these horses were not thus engaged they were sometimes used by the plaintiff in error in filling calls for funerals, parties or other trip service, and when so employed the plaintiff in error furnished the carriage and the driver and made a charge for each trip. There were two regular employees at the barn who made these trips when there was a call for a carriage. If for any reason one of these men could not go or both were busy with calls, arrangements were made with someone to make the trip, and this person was paid twenty-five per cent of the money earned on the trip. In order to avail himself of the opportunity to make these extra trips, Charles E. Poole, defendant in error, stayed around the barn most of his time. He was permitted to sleep in the barn and provided himself with sleeping accommodations wherever convenient,—a part of the time in the harness room and a part of the time in one of the stalls. He was not on the pay-roll and was not a regular employee of the

plaintiff in error. Since August, 1912, Poole had availed himself of the privilege of sleeping in the barn, and by keeping himself in close touch with the barn had been able to keep reasonably regularly employed by making these special trips and by doing other odd jobs about the barn. When the regular drivers were not available Poole was given the opportunity to make the trip, and if he desired he made the trip and was paid at the end of the trip twenty-five per cent of the money earned on the trip. If for any reason the regular employees of the plaintiff in error were not able to keep the premises or the horses clean, the foreman would say to Poole that he would give him fifty cents for sweeping the floor, or would give him a quarter for cleaning a horse and hitching it up, or something to that effect. If Poole wanted to perform this service he would do so, and would be paid as soon as that service had been performed. Although he remained around the premises most of the time he was not required and was under no obligation to plaintiff in error to perform these services if he was not so disposed. He could come and go as he pleased. If a call came to the barn after twelve o'clock at night, while he was sleeping at the barn, and there was no other employee at the barn, he would answer the call, and if there was a request for service he would make the trip and the next morning would be paid his twenty-five per cent of the money earned on that trip. September 10, 1914, Poole was about the barn throughout the day. He went on an individual errand for one of the employees of plaintiff in error and was paid by that employee from said employee's individual funds a small sum for the service. At the time he was injured he was walking across the floor of the barn with a duster in his hand and was going to dust the top of the carriage which he sometimes used in making his trips. He collided with Hugo Claire, a delivery boy in the employ of Carson, Pirie, Scott & Co. and they fell to the floor, and in the fall Poole's hip was broken.

Plaintiff in error contends that Poole was not an employee of it in the sense the term "employee" is used in the Workmen's Compensation act, and contends that such employment as Poole had with it at the time he was injured was but casual. Section 5 of that act provided at the time of this injury and at the time of the hearing before the Industrial Commission, that the term "employee," as used in the act, shall be construed to mean "every person in the service of another under any contract of hire, express or implied, oral or written, * * * but not including any person whose employment is but casual." In *Aurora Brewing Co. v. Industrial Board*, 277 Ill. 142, we collected authorities and discussed at length what was meant by "casual employment," as that term was used in the Workmen's Compensation act. We there held that occasional, irregular or incidental employment was a casual employment. In *McLaughlin v. Industrial Board*, 281 Ill. 100, a laborer who was assisting in the making of a dirt road, and who was employed for plowing and grading the road and hauling stumps off the road after they had been pulled or blown out and to do any other such task as was assigned to him by the road commissioner, was asked by the road commissioner to assist some experts who were dynamiting or blowing out stumps. It was held that inasmuch as this particular employment took but a few minutes of time, and inasmuch as it was not a regular or stable employment within the meaning of the statute, it was merely a casual employment. In *Baer's Express Co. v. Industrial Board*, 282 Ill. 44, a boy sixteen years old, who had been seen occasionally driving a wagon for the express company and who was killed by the kick of a horse in the barns of the company on the morning of the day on which he had been promised a steady job by a member of the firm, was held to be a casual employee. In *Chicago Great Western Railroad Co. v. Industrial Com.* 284 Ill. 573, a structural ironworker was employed for a few days' work on a driveway

being constructed from a public viaduct to the company's freight house, and it was there held that his employment must be regarded as casual because it was occasional, irregular and incidental as distinguished from regular and continuous. In *Thede Bros. v. Industrial Com.* 285 Ill. 483, the employer had a number of regular men whom it used in its transfer and storage business, and when extra help was needed for heavy work it picked up this extra help as it was needed. One Marsh was so employed to help move a heavy furnace. They did not get through with the job the first day but Marsh was paid for his day's work. He came back the next morning and the moving of the furnace was completed about nine o'clock. He was then told to go with the teamster and they started moving a washing machine, in which operation his hands were caught in a pulley and injured. It was held that inasmuch as he was employed for no definite time and did not intend to become a regular employee and the employer did not intend him to become a regular employee, and inasmuch as he was not on the regular pay-roll, his employment was casual.

The conclusion reached on the question of casual employment renders it unnecessary for us to consider whether plaintiff in error was engaged in a business, occupation or enterprise enumerated in section 3 of the Workmen's Compensation act as it existed at the time of this injury or whether the accident arose out of and in the course of the employment.

The circuit court erred in entering judgment affirming the decision of the Industrial Commission, because, as we view it, no recovery could be had under the Workmen's Compensation act for the injury to the defendant in error, Poole. The judgment of the circuit court is therefore reversed.

Judgment reversed.

(No. 12687.—Judgment affirmed.)

ALBERT RUPP *et al.* Appellants, *vs.* JOHN M. JONES *et al.*
Appellees.

Opinion filed October 27, 1919.

1. *WILLS*—attesting witnesses need not sign in presence of each other. The statute on wills makes no requirement that the two attesting witnesses shall witness the will in the presence of each other, but merely requires that each of them attest the will in the presence of the deceased and at his request.

2. *SAME*—proper attestation clause is *prima facie* evidence of due execution of will. Where the attestation clause to a will recites all the particulars of a good execution it is *prima facie* evidence of the due execution of the will, and such proof may prevail over testimony of the attesting witnesses which tends to show that some of the requisites were omitted.

3. *SAME*—when failure of recollection of the attesting witnesses will not preclude probate of will. Where a will contains a full and formal attestation clause, the signature to the will is shown to be in the handwriting of the testator and the will is fully identified as the instrument attested by the witnesses, the fact that they do not remember seeing the testator sign the will nor recollect that he acknowledged it to be his act and deed does not preclude the probate of the will.

APPEAL from the Circuit Court of Marion county; the
Hon. WILLIAM B. WRIGHT, Judge, presiding.

WHAM & WHAM, for appellants.

NOLEMAN & SMITH, for appellees.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

Dora Rupp, widow of William Rupp, deceased, filed her petition in the probate court of Marion county to probate the last will and testament of her husband and asked that letters testamentary be issued to her as executrix. Proof of death was filed and a *dedimus potestatem* was sued out to take the deposition of E. J. Besant, one of the attesting witnesses, who was then living in the State of California.

Dora Rupp died intestate, leaving no child or children or descendants thereof but leaving her mother and brothers and sisters surviving as her only heirs. On January 3, 1919, the cause came on for hearing. The death of Dora Rupp was suggested and a supplemental petition was filed substituting her brother, J. M. Jones, as petitioner, and asking that he be appointed as administrator of the estate of William Rupp, deceased, with the will annexed. The court found that Albert Rupp and Fred Rupp, brothers, and Fred Sweeney, a nephew, and Dora Rupp, widow, were all the heirs and legatees of the deceased, William Rupp, and that each of them had been notified of the pendency of the proceeding, as required by law. Upon the evidence heard the county court admitted the instrument to probate as the last will and testament of William Rupp. From that order Albert Rupp and Fred Rupp appealed to the circuit court of Marion county, which also entered an order admitting the will to probate. Appellants then prosecuted this appeal.

The will was dated July 12, 1905, and was drawn on a printed form, the written portions of which were in the handwriting of the testator. E. J. Besant, subscribing witness, testified in his deposition that he was acquainted with the testator, William Rupp, in his lifetime, and that he was about forty years of age and on the date of his will was of sound mind; that Rupp asked him to sign said instrument as a witness, and that he signed it as such in the presence of Rupp, and that the testator saw him sign his name as such witness. He did not remember whether Charles Nall was present or not when he signed it, and does not remember whether he saw Rupp sign his name to the instrument. The testator came to his store to get him to witness the instrument, and he thinks George F. Besant, his brother, and Sam Carnes, a clerk, were also present.

Charles Nall, the other attesting witness, was at that time a grocer in the same block where Besant was conducting his store. He testified that the testator was a customer

of his and that he had known him four or five years prior to 1905; that the occupation of the testator was that of freight conductor on the Illinois Central railroad; that he was also acquainted with Besant; that Rupp came to his store and asked him to witness a paper he had with him,—the will in question,—and added that in case something should happen it would be of some protection to his wife; that he signed the paper as a witness but does not recollect whether Rupp's signature was on the paper when he signed it; that he is positive that the will is the instrument that he signed and thinks that it is in the same condition at the time of the trial as it was when he signed it; that he did not read any part of the will at the time he signed it and did not look to see what was written on it and thinks that the attestation clause was not read over to him; that Rupp did not say anything to him about the instrument being his will or that he had signed it or that the instrument was one that he had made himself; that no one else was present except Rupp and himself when he signed it as witness. He also testified that he had forgotten at one time that he had ever signed the instrument but that after refreshing his recollection he remembered it. Both he and Besant testified that the testator was of sound mind at the time he signed the will and was under no restraint whatever.

Four other witnesses testified for the proponents of the will in the circuit court. One of them, a banker, testified that the entire written portions of the will were in the handwriting of the deceased and that the signature to the will was the genuine signature of the testator, he having seen him sign his name a number of times. The other three were railroad men, who testified that they were well acquainted with the signature of Rupp and that the signature to the will was the signature of Rupp. All four of them testified, also, that the signatures to two exhibits that were introduced and put in evidence contained the genuine signatures of Rupp.

Appellants contend that the lower court erred in admitting the exhibits in evidence for comparison with the signature to the will because the statutory notice was not given that such exhibits would be used on the trial. No such objection was made in the trial court and it comes too late in this court to be considered. Besides, if it should be conceded that it was error to admit these two exhibits for the purpose of comparison of the signatures thereon with the signature on the will, such ruling of the circuit court would not be reversible error. It was amply proved by the other evidence in the case that the signature to the will was the genuine signature of the testator, and there is no evidence in the record contradicting the same. Only two witnesses testified on behalf of appellants,—the brother of Besant, one of the attesting witnesses, and his clerk, both of whom merely testified that they were not present when Besant attested the will or near enough to know anything about it, and that no such attestation was ever made in their presence to which their attention was called. The evidence complained of is merely cumulative and upon a question that is not at all contested in the evidence.

The other contention of appellants, that the instrument offered in evidence was not proved to be the last will and testament of William Rupp and properly attested according to the provisions of our statute on wills, cannot be sustained. It is positively proved that the instrument in question was the instrument witnessed by the attesting witnesses and that each one of them attested it in the presence of the deceased, at his request. It was not necessary that the two attesting witnesses should witness the will in the presence of each other. The statute makes no such requirement. (*Flinn v. Owen*, 58 Ill. 111.) The testimony of neither of the attesting witnesses is to the effect that the testator signed or acknowledged the will to be his in their presence, in express terms. Their testimony clearly showed that he requested them to witness the instrument, and re-

marked to one of them, in substance, that in case anything happened it would be of some protection to his wife, which clearly indicated that they were asked to witness his signature to an instrument in which his wife would be interested or benefited in case of such happening, and clearly indicated that they were asked by him to witness his signature to that will. The attesting clause is in this language: "This instrument was on the day of the date thereof signed, published and declared by the said testator, William Rupp, to be his last will and testament, in the presence of us, who at his request have subscribed our names thereto as witnesses, in his presence and in the presence of each other." It was signed by the two attesting witnesses. The other evidence in the record positively shows that the signature to the will was the genuine signature of the testator. Section 13 of our statute on wills, as amended, now provides that when the probate of any will or testament shall have been allowed or refused by any county or probate court and an appeal shall have been taken from the order or decision of such court allowing or refusing to admit such will to probate, it shall be lawful for the party seeking probate of such will to support the same, on the hearing in the circuit court, by any evidence competent to establish a will in chancery.

Where the attestation clause to a will recites all the particulars of a good execution it will always be *prima facie* evidence of the due execution of the will. Such proof will often prevail over testimony of the attesting witnesses which tends to show that some of the requisites were omitted. (*Thompson v. Owen*, 174 Ill. 229; *Thompson v. Karme*, 268 id. 168; *Gould v. Chicago Theological Seminary*, 189 id. 282; *In re Will of Barry*, 219 id. 391; *Hutchison v. Kelly*, 276 id. 438.) The testator's will had been executed about fourteen years when the attesting witnesses were called into court to testify concerning its execution. It is not singular or unusual for attesting witnesses not to be

able to remember all that occurred at the execution of the will or as to what they saw of the will or of the signature of the testator thereto. Where a will contains a full and formal attestation clause, the signature to the will is shown to be in the handwriting of the testator and the will is fully identified as the instrument attested by the witnesses, the fact that they do not remember seeing the testator sign the will or that he acknowledged it to be his act and deed does not preclude the probate of the will. (*O'Brien v. Estate of Rhembe*, 269 Ill. 592.) The proof was ample in this case to make a *prima facie* case of the due execution of the will, and as it is absolutely uncontradicted the will in question was properly probated.

The judgment of the circuit court is affirmed.

Judgment affirmed.

(No. 12750.—Judgment affirmed.)

THE LIBERTY FOUNDRIES COMPANY, Plaintiff in Error, vs.
THE INDUSTRIAL COMMISSION *et al.*—(MILO ARLOW,
Defendant in Error.)

Opinion filed October 27, 1919.

WORKMEN'S COMPENSATION—*circuit court may exercise discretion on motion to vacate judgment.* A motion to vacate a judgment on an award, which judgment was entered after due notice to the employer, is addressed to the discretion of the court, and where no good reason is shown why payments were not made to the claimant or why there was no appearance to contest the application for judgment there is no abuse of discretion in denying the motion.

WRIT OF ERROR to the Circuit Court of Winnebago county; the Hon. ROBERT K. WELSH, Judge, presiding.

FISHER, NORTH, WELSH & LINSKOTT, for plaintiff in error.

ROY F. HALL, for defendant in error.

Mr. JUSTICE STONE delivered the opinion of the court:

The circuit court of Winnebago county entered a judgment on the award of the arbitrator, which by lapse of time, as required by statute, became the award of the Industrial Commission upon due notice to the plaintiff in error, who had neglected to pay the same according to the award. The circuit court refused to certify that the cause was one proper to be reviewed by this court and a writ of error was allowed here.

On December 23, 1918, an award was made by an arbitrator of the Industrial Commission in favor of the defendant in error and against the plaintiff in error in the sum of \$10.10 per week for a period of eight weeks of temporary total incapacity for work and a further sum of \$10.10 per week for a period of ten weeks, as provided in paragraph (e) of section 8 of the Workmen's Compensation act as amended, for the reason that the injuries sustained caused a permanent and complete loss of five per cent of the use of the left arm of the petitioner, all for an injury which occurred on the 7th day of June, 1918, while both parties were operating under the provisions of the above act. The total amount of compensation is the sum of \$181.80, which had accrued and was due at the time the award was entered. Notice of the award was received by the plaintiff in error January 3, 1919. No petition for review by the Industrial Commission was filed. On February 5, 1919, notice as provided by paragraph (g) of section 19 of the Compensation act was filed with the Industrial Commission, and on that day notice was mailed to the plaintiff in error. The notice in substance recited the fact of the award having been made and that no petition for review had been filed, and notified the plaintiff in error that on February 21, 1919, at nine o'clock A. M., the defendant in error would present to the circuit court of Winnebago county a certified copy of the proceedings before

the Industrial Commission and ask for a judgment for the amount of the award, with reasonable attorney's fees, as provided by statute. No one appeared at the time the motion for judgment was considered in the circuit court, and thereupon judgment was entered for \$183.27, being the amount of the award and accrued interest, and attorney's fees were taxed as a part of the costs of the proceedings before the Industrial Commission and in the circuit court at \$60. On February 22, 1919, plaintiff in error moved the court to vacate said judgment, in which motion the facts of the award and the receipt of the notice of application for judgment were set out, and in support of said motion the plaintiff in error set forth that on the morning of February 21, at or before nine o'clock, the plaintiff in error informed the attorney for the defendant in error that the sum of \$181.80, being the amount of the award, was in the hands and possession of John H. Camlin, of the city of Rockford, Illinois, for the purpose of paying the amount of the award upon delivery of a proper receipt by the defendant in error; that the defendant in error nevertheless filed a certified copy of the award in the circuit court, as herein set forth, upon which judgment has been entered and \$60 attorney's fees taxed; that thereafter, at about eleven o'clock on the 21st day of February, the plaintiff in error tendered \$181.80 in lawful money of the United States to Roy F. Hall, counsel for defendant in error, in satisfaction of the award; that this tender was refused; that the plaintiff in error was ready, willing and anxious to pay the full amount of said award, with legal interest, which was well known by the attorney for defendant in error before judgment was entered thereon. The circuit court overruled said motion and refused to vacate said judgment.

It is contended by the plaintiff in error that the circuit court erred in overruling the motion to vacate said judgment; that the court erred in rendering judgment on the certified copy of the award; that the court erred in con-

struing the Workmen's Compensation act to the effect that whenever an award is made it is payable to the claimant wherever he might be, instead of at the usual and customary place where the payment or payments of wages have been made.

It is not contended by plaintiff in error that defendant in error was not entitled to interest on the award from the date thereof at the rate of five per cent or that the allowance of an attorney's fee is excessive. The only question in this record, therefore, is whether or not the circuit court erred in refusing to vacate the judgment entered February 21. Plaintiff in error's motion to vacate this judgment was addressed to the sound legal discretion of the court, and unless it appears that such discretion has been abused this court will not interfere upon appeal. (*Eggleston v. Royal Trust Co.* 205 Ill. 170.) In this case it appears that the plaintiff in error had paid nothing to defendant in error as compensation from the time of the injury on the 7th day of June, 1918, up to and including February 21, 1919, the date of said judgment, and that the award was entered on December 23. It also appears that defendant in error had served a notice on February 5 that application would be made on February 21, 1919, for judgment. No good reason is shown why payments had not been made to the defendant in error or why there was no appearance to contest the application for judgment. On the whole of this record we are convinced that the circuit court did not abuse its discretion in denying the motion of plaintiff in error to vacate the judgment.

The judgment of the circuit court will therefore be affirmed.

Judgment affirmed.

(No. 12664.—Judgment affirmed.)

THE CITY OF CHICAGO, Defendant in Error, vs. H. C. LOST,
Plaintiff in Error.

Opinion filed October 27, 1919.

1. JUDICIAL NOTICE—*the Supreme Court does not take judicial notice of ordinance.* The Supreme Court does not take judicial notice of a municipal ordinance but the ordinance must be made a part of the record by a bill of exceptions and cannot be shown to the court in any other manner.

2. APPEALS AND ERRORS—*denial of a motion to dismiss writ of error does not cure omission from the record.* A motion to dismiss an appeal or writ of error because of some omission from the record is properly denied where there is a record, properly certified, showing a judgment or decree, as error may be assigned on that part of the record which has been filed, but if it appears on the hearing that the only errors assigned are upon matter not in the record the judgment will be affirmed.

WRIT OF ERROR to the Municipal Court of Chicago;
the Hon. JOHN STELK, Judge, presiding.

H. C. LUST, for plaintiff in error.

SAMUEL A. ETTELSON, Corporation Counsel, and HARRY B. MILLER, (DANIEL WEBSTER, of counsel,) for defendant in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The plaintiff in error, H. C. Lost, was charged in the municipal court of Chicago with knowingly and willfully leaving an automobile stand on a public street of the city of Chicago for a period exceeding thirty minutes, in violation of section 2437 of the revised municipal code of Chicago. On a trial before the court he was found guilty and fined five dollars and has sued out a writ of error from this court to review the judgment.

It is assigned for error that the ordinance under which the plaintiff in error was fined is unconstitutional and void (1) because it unduly discriminates between certain persons of the same class,—namely, the owners or users of motor vehicles; (2) because it is unreasonable, unjust and oppressive, in that no reasonable use is permitted of the streets by the general public between the hours of ten A. M. and four P. M., and because all streets within the district and all alleys are similarly classified, irrespective of the amount of travel on each or lack of travel, and because no such parking privileges between these hours or others are granted to the general public as are granted to the taxicabs; (3) because a city has no private property in its streets but holds them solely as trustee for the public, and legally, therefore, cannot grant a monopoly for the use of such streets, or any part thereof, to private interests. It is further assigned for error that the plaintiff in error was not guilty, because he did not himself park the car.

The ordinance which is assailed as in violation of constitutional rights is not contained in the record. This court does not take judicial notice of the ordinances of a municipality but an ordinance must be made a part of the record by a bill of exceptions and cannot be shown to the court in any other manner. (*Stott v. City of Chicago*, 205 Ill. 281; *People v. Heidelberg Garden Co.* 233 id. 290.) Section 54 of the act creating a municipal court in Chicago requires that court to take judicial notice of all general ordinances of the city but does not require this court to judicially know what they are, and if it did it would be in conflict with section 29 of article 6 of the constitution by providing different procedure and practice on the review of judgments of the municipal court than on the review of judgments of other courts. If the municipal court, with jurisdiction only within the city, may take judicial notice of municipal ordinances, the court can obtain information as to the existence of an ordinance by any method which it

chooses to adopt, and if it should find that a municipal ordinance existed it can make a finding of the fact.

Plaintiff in error seems to consider the question now under consideration as settled by the denial of a motion to dismiss the writ of error. Frequent motions are made to dismiss appeals or writs of error on account of some omission from the record, but if there is a record, properly certified, showing a judgment or decree, such a motion cannot be granted, because error may be assigned on that part of the record which has been filed, and it was so ruled on a motion in this case. If, however, upon the hearing it appears that the errors assigned are upon matters not contained in the record the judgment must be affirmed. The errors alleged concerning the validity of the ordinance can not be considered.

A police officer testified that the car was parked on December 28, 1918, on the west side of Wabash avenue near Jackson boulevard, from 1:00 P. M. to 2:15 P. M.; that the plaintiff in error came to get the car and said he did not leave it there, and was told if he did not, to leave it alone and let the person who did leave it come and get it, but he said it was his car and he intended to take it. The plaintiff in error testified that he did not park the car on Wabash avenue or any other place, but the officer said as long as he was the owner he would serve him with a summons. It does not appear whether the ordinance made the owner of an automobile liable or whether any penalty prescribed was only against the person in possession who left the car on the street.

The ordinance not being in the record there is no assignment of error which could be sustained, and the judgment is affirmed.

Judgment affirmed.

(No. 12314.—Writ dismissed.)

RUTH MCGINNIS, Plaintiff in Error, vs. THOMAS MCGINNIS *et al.* Defendants in Error.

Opinion filed October 27, 1919.

1. **APPEALS AND ERRORS**—*appellate jurisdiction of the Supreme Court is within control of the General Assembly, except in certain cases.* The constitution gives to the Supreme Court original jurisdiction in certain classes of cases and appellate jurisdiction in all other cases, and the appellate jurisdiction, except in criminal cases and cases involving a franchise or freehold or the validity of a statute, is within the control of the General Assembly, subject only to constitutional restrictions.

2. **SAME**—*section 121 of Practice act, as to right of review, is not unconstitutional.* Section 121 of the Practice act, providing when Appellate Court judgments shall be final, makes no discrimination between unsuccessful parties, but the constitutional right of review by exercise of legislative authority has been committed in one class of cases to the Appellate Court and in another class to the Supreme Court, and the statute is not subject to any constitutional objection.

3. **SAME**—*proviso to section 121 of Practice act applies to chancery cases.* The words "*ex contractu*" and "*sounding in damages*," used in the proviso to section 121 of the Practice act, making the Appellate Court's judgment final in such cases unless for more than \$1000, are not used in a technical sense; and the proviso applies also to chancery cases where the object of the suit is the recovery of money and no other separate relief is sought.

4. **SAME**—*when jurisdiction of Supreme Court is not determined by amount of judgment.* If the purpose of the suit is not to recover money or property but for other relief, such as enjoining the levy upon and sale of property under execution or to remove a cloud from title for the protection of the owner, the jurisdiction of the Supreme Court, under section 121 of the Practice act, is not determined by the amount of the judgment.

5. **SAME**—*when proviso to section 121 of Practice act applies although bill seeks to remove fraudulent conveyance.* A bill seeking to remove an alleged fraudulent conveyance for the sole purpose of subjecting the property conveyed to the lien of a judgment is a suit solely for the recovery of money, and if the bill is dismissed for want of equity and the Appellate Court affirms the decree the proviso to section 121 of the Practice act applies and the Supreme Court has no jurisdiction to grant a petition for a writ of *certiorari*.

WRIT OF ERROR to the First Branch Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding.

VINCENT D. WYMAN, HARRY C. KINNE, and CHARLES E. CARPENTER, for plaintiff in error.

EDWARD H. MORRIS, for defendants in error Walter H. McDonald and Alta McDonald.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The plaintiff in error, Ruth McGinnis, presented to this court her petition for a writ of *certiorari* to bring to the court the record of a judgment of the Appellate Court for the First District affirming a decree of the superior court of Cook county. There was no answer to the petition and no suggestion concerning the jurisdiction of the court to award the writ and the petition was granted. Errors having been assigned on the record, the defendants in error Walter H. McDonald and Alta McDonald appeared and entered their motion to dismiss the writ of error for want of jurisdiction and the motion was reserved to the hearing.

The plaintiff in error, Ruth McGinnis, filed her bill of complaint in the superior court of Cook county against Walter H. McDonald, Alta McDonald and Thomas McGinnis, alleging that on March 8, 1915, she recovered a judgment against McGinnis in the circuit court of the city of St. Louis, Missouri, for \$13,434.95; that on June 14, 1915, McGinnis fraudulently and without any consideration made and executed a purported assignment of all interest in two parcels of real estate in Chicago to Walter H. McDonald for the purpose of hindering and delaying the plaintiff in error in securing satisfaction of her judgment and McDonald well knew the purpose of the assignment; that

on June 19, 1915, she commenced her action in debt against McGinnis in the superior court of Cook county to recover the amount of her judgment and sued out a writ of attachment in aid of her action; that the writ was levied on the interest of McGinnis in three parcels of real estate in which he was the owner of a leasehold estate, including the two parcels in question; that she recovered judgment in the superior court on September 22, 1915, for \$13,681.25 and costs, and that a special execution was issued commanding the sheriff to make the amount of the judgment out of the property attached. The prayer of the bill was that the purported assignments of the leases be declared null and void against the lien of plaintiff in error on the premises and should be removed therefrom. The superior court dismissed the bill for want of equity and plaintiff in error appealed to the Appellate Court. In that court the trustee in bankruptcy of Thomas McGinnis was substituted and the Appellate Court affirmed the decree.

Section 121 of the Practice act makes a judgment of an Appellate Court final unless such court shall grant a certificate of importance and an appeal to this court, or this court shall require, by *certiorari* or otherwise, the case to be certified to this court, with a proviso that in actions *ex contractu* (exclusive of actions involving a penalty) and in all cases sounding in damages, the judgment, exclusive of costs, shall be more than \$1000.

In answer to the motion to dismiss the writ of error counsel for plaintiff in error contend that the proviso limiting a right of review by petition for *certiorari* invades constitutional rights and is therefore void; that it violates section 22 of article 4 by conferring a special privilege on unsuccessful defendants which is denied to unsuccessful complainants; that it contravenes section 19 of article 2 by denying a certain remedy in the laws for all injuries and wrongs which one may sustain in his person, property or reputation; that it denies to all suitors the equal pro-

tection of the laws, and therefore violates the fourteenth amendment to the Federal constitution, and that it violates the due process of law provision of the State constitution. The constitution gives to this court original jurisdiction in certain classes of cases and appellate jurisdiction in all other cases, and the appellate jurisdiction, except in criminal cases and cases involving a franchise or freehold or the validity of the statute, is within the control of the General Assembly, subject only to constitutional restrictions. In exercising legislative authority, by section 121 of the Practice act no discrimination between parties has been made, but the right of review by this court has been committed in one class of cases to the Appellate Court and in another to this court. The statute is not subject to any constitutional objection.

Section 121 is found in the act regulating practice and procedure in proceedings at law, but it being plainly apparent that the legislative intention, where the object of a suit was merely the recovery of money, was to deny jurisdiction to grant a writ of *certiorari* unless the judgment or decree was for more than \$1000, it has been held that the words "*ex contractu*" and "sounding in damages" were not used in any technical sense and technical rules have no application. It has therefore been uniformly held that the proviso applies to chancery cases, such as foreclosures, divorce, separate maintenance, mechanics' liens, creditors' bills, accountings, damages on dissolution of an injunction, claims against the estates of deceased persons and bills of interpleader, where the object of the suit was the recovery of money and no other separate and independent relief was sought. (*Lansingh v. Dempster*, 255 Ill. 161; *Barber v. Estate of Keiser*, 279 id. 287; *Dime Savings and Trust Co. v. Watson*, 283 id. 276.) In most of these cases there may be no personal liability whatever but the charge is against the property, which may be relieved of the charge by payment of the money, so that, in effect, the purpose

of the suit is to recover money. If the purpose of the suit is not to recover money or property but for other relief, such as enjoining the levy upon and sale of property under execution or to remove a cloud from title for the protection of the owner, the jurisdiction is not determined by the amount of the judgment. (*Baber v. Pittsburg, Cincinnati and St. Louis Railroad Co.* 93 Ill. 342; *Farmers' Nat. Bank v. Sperling*, 113 id. 273; *Green v. Goff*, 153 id. 534; *Tosetti Brewing Co. v. Koehler*, 200 id. 369; *Lang v. Hedenberg*, 277 id. 368.) The bill of the plaintiff in error sought to remove an alleged fraudulent conveyance, but if removed the property would merely be subject to the lien of her judgment, and it was purely and solely for the recovery of money.

The writ of error is dismissed.

Writ dismissed.

(No. 12710.—Decree affirmed.)

FRED A. MOORE, Appellant, *vs.* NELLIE B. DOWNING *et al.*
Appellees.

Opinion filed October 27, 1919.

1. **DEEDS**—*subsequent conduct of grantor cannot affect delivery, once completed.* Where a deed is in the nature of a voluntary settlement, is delivered without reservation to a custodian to be held until the grantor's death, and where the evidence clearly shows an intention of the grantor to give the property to the grantees, the custodian becomes the representative of the grantees and holds the deed for their benefit, and the subsequent conduct of the grantor with regard to the property cannot affect delivery, once completed.

2. **SAME**—*when acceptance of deed is presumed.* Acceptance of a deed of voluntary settlement, where its terms are beneficial to the grantees, is presumed, even though the grantees had no knowledge of the existence of the deed until after the grantor's death.

3. **SAME**—*subsequent change of intention of grantor cannot affect delivery.* Where a deed is delivered to a custodian without reservation, to be held until the grantor's death, when it is to be

delivered to the grantees, a subsequent change of intention of the grantor, with the fact that he has access to the deed, cannot affect the delivery, which was made upon the express understanding of the grantor that he was to retain no control over the deed.

APPEAL from the Circuit Court of Vermilion county; the Hon. WALTER BREWER, Judge, presiding.

E. L. MAHER, and HILES & SIMPSON, for appellant.

ACTON & ACTON, for appellees.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

This is an appeal from a decree of the circuit court of Vermilion county holding that appellant, Fred A. Moore, a nephew of George W. Schultz, deceased, has no interest in the following described real estate: The east half of lots 1 and 2 in the northwest quarter of section 2, and the north half of the east half of the southwest quarter of section 2, all in township 18, north, range 13, west of the second principal meridian, and the southeast quarter of the southwest quarter of section 35 and the west half of the east half of the southwest quarter of section 26, all in township 19, north, range 13, west of the second principal meridian, and all situated in the county of Vermilion, State of Illinois, and finding that the title to said real estate is in appellees, Nellie B. Downing and Minnie Lyle, nieces of George W. Schultz, by virtue of a deed executed and delivered by him October 16, 1909.

The only question presented for review by this appeal is whether the above deed was delivered. This question must be determined chiefly from the testimony of the custodian, James McGary. He testified that for fifteen or twenty years he had been a very close friend of the grantor; that October 16, 1909, he was called to the law office of Acton & Acton, in Danville, Illinois; that when he arrived,

there were present George W. Schultz, the grantor, and William W. Acton, one of the members of the law firm; that Acton then advised him that the grantor was preparing some deeds conveying his lands to certain of his nieces; that Acton told the grantor that in order to make a valid conveyance of the property in the manner he desired it would be necessary for him to deliver the deeds to some third person and that he would have to part with all control over the deeds and not reserve any right to recall them; that grantor then handed to witness, together with other papers, this deed conveying the above described premises to Nellie B. Downing and Minnie Lyle, and said to witness, "When I die I want you to take these down to the recorder's office and have them recorded and turn them over to Mrs. Lyle and Mrs. Downing;" that witness said, "All right; I'll do that;" that grantor then handed witness instructions written on a letter-head of Acton & Acton, which read as follows:

"To James McGary: "DANVILLE, ILLINOIS, October 16, 1909.

"I hereby deliver to you the two deeds, one to Nellie B. Downing and Minnie Lyle and the other to Mary Eleanor Downing and Margaret Downing, and direct that you hold the same until my death and then deliver the same to the respective grantees, without any right on my part to recall or reclaim said deeds from you.

"Yours truly,

GEORGE W. SCHULTZ."

—that Acton then placed the deeds and the memorandum in a large envelope, on which Acton wrote witness' name; that grantor carried the envelope and its contents downstairs and again handed it to witness that night or early the next morning; that witness told grantor that he would place the package in the safe of Berhalter & Olmsted, for whom witness worked; that grantor suggested a safety deposit box as a safer place, and that witness engaged such a box at the American Bank and Trust Company on October 18, 1909; that the envelope was sealed and by witness placed in this box, and that it remained there until after the death of grantor; that grantor was given a key to this box,

and a power of attorney was executed by witness giving grantor authority to open the box at his pleasure; that the envelope containing the deeds remained in the box undisturbed and unchanged from October 18, 1909, to January 9, 1918,—about ten days after the death of grantor; that on that date witness met A. L. White, administrator of the estate of George W. Schultz, deceased, and the two of them, in the presence of J. A. Foster, cashier of the bank, unlocked the box and removed from it this envelope, together with other papers belonging to witness and some private papers belonging to deceased; that witness unsealed the envelope delivered to him by grantor by cutting it open with his knife and handed the deed in question to Minnie Lyle, who took it and had it recorded.

Whatever the grantor might have done with regard to this property after the deed was delivered to McGary could not change the effect of the specific directions given McGary at the time of delivery. The deed was then delivered without reservation and the custodian at once became the representative of the grantees and held the deed for their benefit. (*Bogan v. Swearingen*, 199 Ill. 454; *DeGraff v. Manz*, 251 id. 531.) Acceptance of a deed of voluntary settlement, where its terms are beneficial to the grantees, is presumed even though the grantees had no knowledge of the existence of the deed until after the grantor's death. (*Baker v. Hall*, 214 Ill. 364.) Whether or not this deed was delivered depends upon the intention of the grantor when it was handed to McGary. If he then intended to part with its custody and control and to have it take effect as a conveyance it was then delivered. In view of the advice of the attorney emphasizing the necessity of a delivery and of retaining no control over the deed, and of the typewritten directions which pointed out specifically the grantor's purpose and intention, there can be no doubt as to the intention of George W. Schultz when the deeds were placed in the possession of his friend, James McGary. A subse-

quent change of intention, if any were shown, could not affect the delivery thus completed; and even a mental reservation by the grantor contrary to that expressed by his words and acts, existing only in his own mind, would not invalidate the delivery effected by his acts and the words actually used. *Hudson v. Hudson*, 287 Ill. 286.

It is contended by the appellant that the fact that the grantor exercised full control over these premises during the nine years intervening between the execution of this deed and the death of the grantor; that the grantor was active in the organization of a drainage district including these lands; that the grantor sold a small strip along the right of way to the Wabash Railroad Company, and that the grantor listed this property with a real estate agent for sale, are all acts which are inconsistent with the grantor's intention to convey this land to the grantees at the time the deeds were executed. There would be considerable force to these contentions if it were not for the specific directions given to the custodian at the time the deeds were actually delivered. The fact that a deed is found in the grantor's possession after his death; that he retained possession and control of the property after making the deed; that he paid the taxes; that he renewed a mortgage; that he insured the premises and collected the insurance on a barn on the premises, will not overcome evidence of delivery based upon the legal presumption arising from the fact that the deed was in the nature of a voluntary settlement, where the evidence clearly shows the intention of the grantor to give the property to the grantees. *Ward v. Conklin*, 232 Ill. 553; *Kelly v. Bapst*, 272 id. 237.

The evidence fully sustains the finding of the chancellor, and the decree of the circuit court is therefore affirmed.

Decree affirmed.

(No. 12784.—Decree affirmed.)

THE GARDEN CITY SAND COMPANY, Appellant, vs. S. J. CHRISTLEY *et al.* Appellees.

Opinion filed October 27, 1919.

1. MORTGAGES—*when purchaser at master's sale cannot object to right of another creditor to redeem.* Where a company goes out of business and conveys its property to a trustee for the benefit of creditors the conveyance is, in effect, a mortgage, and a creditor who has filed a bill for dissolution of the trust and has purchased the property at the master's sale cannot object to the right of another creditor of the grantor to redeem, on the ground that the redeeming creditor is not a creditor of the trustee.

2. SAME—*when a deed absolute on its face is a mortgage.* A deed, although absolute on its face, is in law a mortgage where it is given to secure a debt or to secure the performance of a certain act.

3. REDEMPTION—*meaning of term "any judgment creditor," in section 20 of statute on judgments and decrees.* In section 20 of the statute on judgments and decrees, giving any judgment creditor the right to redeem, the term "any judgment creditor" means any creditor having a judgment upon which execution may be issued at the time he seeks to redeem, without respect to when the judgment was obtained.

4. SAME—*judgment need not be a lien on land to give right of redemption from execution sale.* To entitle a judgment creditor to redeem from execution sale it is not necessary that his judgment be a lien on the land involved.

5. SAME—*when holder of certificate of sale is not entitled to be reimbursed for taxes and expenses.* Under section 27a of the statute on judgments and decrees (Hurd's Stat. 1916, p. 1589,) the holder of a certificate of a master's sale will not be entitled to be reimbursed for taxes and expenses when a judgment creditor subsequently redeems from the sale, unless said holder has filed receipts for such taxes and expenses with the sheriff or other officer who made the sale.

6. PLEADING—*filing replication admits plea to be good in law.* Where a complainant files a replication to the plea to his bill he admits the plea to be good in law and raises only an issue on the facts alleged.

7. STATUTES—*statutes of redemption should be liberally construed.* Statutes of redemption should be liberally construed, in order that the property of the debtor may pay as many of his debts and liabilities as possible.

APPEAL from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding.

EDWIN C. CRAWFORD, for appellant.

NING ELEY, (ROBERT ZALESKI, of counsel,) for appellees.

Mr. JUSTICE STONE delivered the opinion of the court:

This is an appeal from the superior court of Cook county dismissing for want of equity appellant's bill for injunction to restrain the sheriff of Cook county from selling certain property under execution and levy, or, if such sale had been made and deed issued, to set said deed aside.

The bill of complaint sets forth, in substance, that the J. W. Dopp Foundry and Manufacturing Company had ceased business May 1, 1911, at which time, being owner of the land and plant described in the bill of complaint, it conveyed the same to William G. Eaton, a member of the firm of Eaton, Rhodes & Co., a creditor of the Dopp Company; that after the deed to Eaton was recorded, Eaton by letter dated February 19, 1912, stated to the creditors of the Dopp Company, among whom was the appellant, that he (Eaton) held the property as trustee for such creditors as should join Eaton, Rhodes & Co. in a certain proposition set out in this circular letter. In answer to this letter of Eaton the appellant accepted the proposition contained in the letter and thereby became one of the beneficiaries of the trust created by said deed. Eaton, while holding said property in trust, did not perfect the plan thus proposed to certain creditors who would join with Eaton, Rhodes & Co. and neglected to pay taxes for the year 1914, for which taxes the property was sold on September 3, 1915, from which sale no redemption was had until the appellant filed its bill, as hereinafter stated; that Eaton neglected to insure the property and permitted the same to

stand unused and unprotected; that the appellant, complainant in the instant case, then filed a bill in equity to terminate said trust and to have Eaton declared trustee for the benefit of appellant and other creditors and to enjoin him from selling or incumbering said real estate; that he convert the real estate into money and distribute the proceeds derived from the sale of the same among all the creditors who proved their claims in that proceeding. William G. Eaton and Eaton, Rhodes & Co. were the only defendants to the bill, the other defendant having been dismissed from said cause.

A decree was entered on said bill to terminate the trust, granting the relief prayed for and ordering the property in question to be sold as prayed in the bill of complaint. The master sold the property, as required by the decree of the court, for \$849.79. The appellant, the Garden City Land Company, which was the complainant in that bill, was the purchaser at said sale and received from the master a certificate of sale reciting that appellant would be entitled to a deed February 7, 1918, unless theretofore redeemed according to law. On January 15, 1918, prior to the expiration of the period of redemption, the appellee S. J. Christley recovered a judgment at law on a judgment note against the Dopp Company for \$8280 and costs of suit, upon which an execution was issued on February 4, 1918. On February 5, 1918, Christley deposited with the sheriff the amount of the purchase price at the master's sale and interest thereon and costs, and the sheriff issued to him a certificate of redemption from the master's sale, and on March 7, 1918, the sheriff sold the property under Christley's execution and issued a sheriff's deed to Christley, who purchased the property at the sheriff's sale. The bill in the instant case seeks to enjoin the sheriff from making a deed to Christley under such judgment sale, or, if a deed is made, to set the same aside. As the record shows the deed to have been made, the bill will be considered one to set aside said deed.

The appellees filed a plea to the bill of complaint admitting the facts substantially as herein set forth, claiming their right to redeem from the master's sale and setting forth the payment of the amount bid at that sale and the accrued interest and costs and the receipt of the certificate of redemption as herein set forth, and also averring that the appellant, as a corporation, may not own, possess or enjoy the property in question except in the collection of the debt due it from the Dopp Company. To this plea appellant filed a replication in the usual form. By agreement of counsel the cause was referred to the master, who found there was no equity in the bill, and in a supplemental report the master found against the appellant as to the sum of \$615.59 expended by it during the period of redemption from the master's sale for protection of the property, on the ground that the receipts therefor were not filed with the master in chancery or other officer, in compliance with the statute relating to such matters. The court entered a decree dismissing the complainant's bill of complaint for want of equity.

It is contended by the appellant that the Dopp Company, by reason of its conveyance to Eaton, had no such interest in the land in question as would be subject to execution on the judgment of S. J. Christley acquired after said conveyance; that since Christley had no judgment against Eaton he could not redeem from the decree and sale by the master, as aforesaid, in which proceedings the Dopp Company was not a party but was a stranger to the whole record, and therefore Christley and the sheriff should be enjoined from selling said real estate under the levy, and if the same had been sold such sale should be set aside.

It is contended by the appellees that the deed to Eaton is in legal effect a mortgage to secure such creditors of the Dopp Company as accepted the proposition of Eaton; that the proceedings against Eaton were in legal effect the foreclosure of a mortgage, from which the Dopp Company

had the right of redemption within twelve months and the creditors of the Dopp Company within fifteen months; that the appellee Christley, being a judgment creditor of the Dopp Company, had the right to redeem from the master's sale aforesaid within fifteen months upon payment of the amount received at said sale, with interest and costs; that the \$615.59 paid by the appellant during the period of redemption for the up-keep and benefit of said property should not be included in the amount paid for the redemption, on the ground that receipts for such payment were not filed with the sheriff or other officer, as required by the statute; that the complainant has not set forth in its bill grounds for equitable relief.

The principal question involved in this case is whether or not Christley had the right to redeem from the sale of this property in a suit against Eaton, trustee. Appellant urges that he had not such right because he was a creditor of the Dopp Company and was not a creditor of Eaton. It is evident that Eaton held the property conveyed to him by the Dopp Company for the benefit of creditors, and that although the deed was in form an absolute deed, such deed was in effect a mortgage. The only basis of appellant's decree for sale in the suit against Eaton was that it was a creditor of the Dopp Company and that the property was, in fact, the property of the Dopp Company. Appellant, therefore, cannot blow both hot and cold on that question. Having recovered this decree of sale on that ground, it will not now be heard to say that the property belonged to Eaton and that the Dopp Company had no interest in it. It was held in *Fitch v. Wetherbee*, 110 Ill. 475, that a deed, although absolute on its face, is in law a mortgage, where it is given to secure a debt or to secure the performance of a certain act.

Paragraph 20 of the chapter on judgments, decrees and executions, provides that where the owner of land or par-

ties interested through him do not redeem from a judgment sale within twelve months, then any decree or judgment creditor may, after the expiration of twelve months and before the expiration of fifteen months, redeem the premises by suing out an execution upon his judgment or decree and placing the same in the hands of the sheriff or other proper officer to execute. The language "any judgment creditor" has been held to mean any creditor having a judgment upon which execution may be issued at the time he seeks to redeem, without respect to when the judgment was obtained. *Kerr v. Miller*, 259 Ill. 516; *Meier v. Hilton*, 257 id. 174.

It is urged that the Dopp Company was not made a party defendant to the suit against Eaton, and that therefore a judgment creditor of the Dopp Company does not have a right of redemption. The only effect of the failure of appellant to make the Dopp Company a party defendant in that suit was to leave untouched the equity of redemption which the Dopp Company had under its deed of trust to Eaton. Equity looks to the substance and not to the form, and where, as here, the property was, in fact, the property of the Dopp Company, appellant cannot be heard in equity to take the benefit of its own failure to make the Dopp Company a party defendant. In addition, it may be said that it is established in this State that in order to entitle a judgment creditor to redeem from execution sale it is not necessary that his judgment be a lien on the land involved. (*Swezey v. Chandler*, 11 Ill. 445; *Karnes v. Lloyd*, 52 id. 113; *Fitch v. Wetherbee*, *supra*.) It will be seen, therefore, that as between appellant and appellees, appellees had the right to redeem.

Appellant also contends that the plea of appellees is not good. It, however, filed a replication to the plea, and by so doing admitted the plea to be good in law and raised an issue on the facts alleged, only. (Puterbaugh's Ch. Pl. & Pr.—ed. of 1916,—136.)

It is earnestly urged on behalf of appellant that it should be allowed a further sum, and interest thereon, for taxes and up-keep of the premises in question. Although this matter was not made a part of the bill of complaint of appellant, evidence was heard thereon by the master and a supplemental report was filed denying the appellant right to such relief, which report was affirmed by the chancellor. Section 27a of chapter 77, before the amendment of 1917, provided the method to be followed if the holder of a certificate of sale under execution or decree desired to be reimbursed for the payment of taxes and expenses. That section required that receipts for such expenditures should be filed with the sheriff, master in chancery or other officer who made the sale. This was in order that the redeeming creditor might know the condition of the property. This was not done. The sale of property under decree or execution or judgment is a matter provided for by statute, as is the redemption thereunder by the judgment creditor. It is a proceeding at law and not in equity, and the statute must be complied with if its benefits are to be had. The chancellor did not err in denying appellant reimbursement and interest for its expenditures in the up-keep of the premises, in the absence of such receipts.

We are of the opinion that appellant's bill was without equity. Statutes of redemption must be liberally construed, to the end that the property of the debtor may pay as many of its debts and liabilities as possible. *Schuck v. Gerlach*, 101 Ill. 338; *Kerr v. Miller*, *supra*; *Fitch v. Wetherbee*, *supra*.

The chancellor did not err in dismissing appellant's bill of complaint. The decree of the superior court will therefore be affirmed.

Decree affirmed.

(No. 12411.—Reversed and remanded.)

REVILO OLIVER vs. FLORENCE ROSS *et al.*—(FLORA OLIVER, Appellant, vs. FLORENCE ROSS *et al.* Appellees.)

Opinion filed October 27, 1919.

1. APPEALS AND ERRORS—*when Supreme Court is not bound by finding of chancellor on conflicting evidence.* Where all the testimony in a proceeding in chancery is taken before the master and the chancellor does not hear any of the witnesses, the Supreme Court is not bound by the rule that the finding of the chancellor will not be disturbed unless it is manifestly against the weight of the evidence.

2. PLEADING—*when a supplemental bill forms a part of original case.* Where a supplemental bill is, in effect, but an amendment to the original bill, by which matter which has transpired since the filing of the original bill is brought into the case, the supplemental bill forms a part of the original case.

3. DEEDS—*beneficiary must prove parties dealt at arm's length where fiduciary relation exists.* Where a fiduciary relation exists between parties any transaction involving the transfer of property between them and in which one of the parties becomes a beneficiary will be looked upon with disfavor, and the burden is on the beneficiary to show that the dealing was at arm's length.

4. SAME—*charge that deed is a forgery must be proved beyond reasonable doubt.* In a proceeding in equity where a party seeks to set aside a deed because it is a forgery, the charge of forgery must be proved beyond a reasonable doubt.

5. ESTOPPEL—*estoppel may arise from omission to assert right.* Estoppel may arise from silence as well as words, where there is the duty to speak and the party on whom the duty rests keeps silent after knowing the circumstances and having opportunity to speak, and it is the duty of a person having a right and seeing another about to commit an act infringing upon it, to assert his right.

6. SAME—*party challenging title to real property must be diligent in discovering its invalidity.* The party who challenges the title of his adversary to real property must be diligent in discovering that which will render the title invalid and must be diligent in his application for relief.

7. SAME—*when a wife is estopped to assert title.* A wife who, without asserting any claim of her own, participates in a chancery suit in which her husband claims to own the land involved, will be estopped to present her claim of ownership after the master makes a finding adverse to her husband.

8. FRAUD—*when deeds and a will should be set aside.* Deeds and a will procured by the chief beneficiary from her mother should be set aside where the preponderance of the evidence shows they were obtained by fraudulent representations and undue influence by the daughter.

APPEAL from the Circuit Court of Livingston county; the Hon. T. M. HARRIS, Judge, presiding.

THOMAS E. LYON, and W. W. SHELLEY, (EDWARD D. SHURTLEFF, of counsel,) for appellant.

W. R. HUNTER, (FRANK ORTMAN, of counsel,) for appellee Florence Ross.

ADSIT & THOMPSON, for Mary E. Oliver and other appellees.

Mr. JUSTICE THOMPSON delivered the opinion of the court:

This is an appeal from a decree of the circuit court of Livingston county establishing the ownership of section 33, township 26, north, range 8, east of the third principal meridian, situated in the town of Chatsworth, and lot 1 in the northwest quarter of section 5, lot 1 in the northeast quarter of section 6, lot 5 in the northwest quarter of section 5, the east half of lot 5 in the northeast quarter of section 6, and lot 5 in the northeast quarter of section 5, all in township 25, north, range 8, east of the third principal meridian, and situated in the town of Germanville, all in the county of Livingston and State of Illinois.

Amaretta Oliver became the owner of section 33 about 1880 by virtue of a deed from Franklin Oliver, her divorced husband. Franklin Oliver was married to Amaretta Oliver in 1850. They had three children: Revilo, born in 1853, John, born in 1858, and Florence, born in 1873. They settled in Livingston county at an early date and se-

cured claims and acquired rights to nearly 4000 acres of land. In 1879 they were divorced. Franklin Oliver, it appears, was a poor business man, and when he died, in 1881, he was without property. From time to time Amaretta Oliver acquired title to the lands here in controversy and other lands. This litigation grows out of a series of deeds, wills, trust agreements and lien notes secured from time to time from Amaretta Oliver by her son Revilo Oliver, and by her daughter, Florence Oliver Ross.

The pleadings and the evidence are very voluminous. On account of the involved condition of the pleadings we set them out more fully than is usually necessary in order to determine what is at issue. Because of the insufficiency of the abstract and the disposition of the parties to disagree on all the facts, we have been compelled to search through the record of approximately 3000 pages in an attempt to fairly determine the issues here presented.

Revilo Oliver lived with his mother from the date of his birth until her death, August 11, 1908, and was in active management of her affairs. John Oliver left home as a young man and maintained his home elsewhere until his mother's death. Florence Oliver married Thomas Ross in 1890 and has not lived at her mother's home since that time. The evidence in the record shows that the relations between Amaretta Oliver and Revilo Oliver were unusually close, even for mother and son. He managed all her affairs. It appears that the real estate which she owned at the time of the death of her husband was mortgaged for about one-fourth of its value. This mortgage was paid off by returns from the lands under the management and operation of Revilo. More land was accumulated under Revilo's management, the title being taken sometimes in the name of Amaretta and sometimes in the name of Revilo. The banking business, the leasing of the lands and all the other transactions were done first in the name of one and then in the name of the other. It is undisputed that the mother

often said that if it had not been for Revilo she would not be the owner of any property.' Many witnesses testified to this fact, in addition to many other facts which showed the very high regard in which Revilo was held by his mother and the great affection she had for him. It is also apparent from the record that Revilo was able to make much money but unable to keep it. The record shows nothing unusual with respect to the relations between John and his mother. There appears to have been some trouble between Florence and her mother. Shortly after the birth of Gertrude, the first child of Florence, Gertrude came to live with her grandmother and her uncle Revilo. It appears that she was nurtured and raised in this home until she was twelve years of age, during which time a governess was provided for her and she was also sent to school. There appears to have been some trouble between Florence and her mother about this time, and Gertrude was taken from her grandmother's home and was not permitted to return after that. This statement is necessary to throw light on the future conduct of these parties and the circumstances under which the deeds and wills were executed.

The first instrument involved here is styled in the record a trust agreement. It reads:

"This is to certify that I hold in trust for Revilo Oliver a one-half interest in the following described property, to-wit: Lot one (1) in the northwest quarter ($\frac{1}{4}$) section five (5) and lot one (1) in the northeast quarter ($\frac{1}{4}$) section six (6), containing 160 acres, known as the Stuckey farm; also lot five (5) in the northwest quarter ($\frac{1}{4}$) section five (5), and the east half ($\frac{1}{2}$) of lot five (5) in the northeast quarter ($\frac{1}{4}$) section six (6), containing 185 acres, known as the Stinley farm, all in town twenty-five (25), north, range eight (8), east of the third principal meridian, situated in the county of Livingston and State of Illinois, said interest to be conveyed to the said Revilo Oliver as soon as the mortgages now on the said property are paid and satisfied in full, or as soon thereafter as the said Revilo Oliver may desire.

"Given under my hand and seal this 29th day of August, A. D. 1899.

AMARETTA OLIVER."

This instrument was recorded April 6, 1911. In 1881 Revilo Oliver secured title to said section 33 through sheriff's deeds. Later, the mother quit-claimed to Revilo all her interest in section 33, so that he had full and complete title to the section. This title remained in him until 1887, when the land was conveyed to his mother through her brother, Niles Smith. The title remained in Amaretta Oliver until 1907, with the exception of two days in 1897, during which time Revilo held title to the land. This was about the time Revilo married Maud Barlow, a woman of questionable character. Legal title was conveyed to Revilo by his mother, at the suggestion of the Barlow woman, without Revilo's knowledge. Two days later it was re-conveyed by Revilo to his mother for an expressed consideration of \$48,000. Seven years later the following instrument was prepared:

"\$64,000.

CHATSWORTH, ILLINOIS, *October 22nd, 1904.*

"On or before five years after date I promise to pay to the order of Revilo Oliver sixty-four thousand dollars, with interest at five per cent per annum. This note is given for the entire purchase money and interest from date of sale for section thirty-three, town twenty-six, north, range eight, east of the third principal meridian, situated in Livingston county, Illinois, value received, said land to remain in the possession of said Revilo Oliver until note is paid.

"Due Oct. 22nd, 1909.

AMARETTA OLIVER."

On the back of the above note appears the following:

"I hereby accept this note for the entire purchase money and interest from date of sale, for section thirty-three (33), town twenty-six (26), north, range eight (8), east of the third principal meridian, situated in the county of Livingston, in the State of Illinois. I also agree that this note shall not become a lien on any property my mother, Amaretta Oliver, now owns, except said section thirty-three as above described.

REVILO OLIVER."

This instrument was recorded in Livingston county March 28, 1911. September 8, 1904, Amaretta Oliver executed a will, by which she gave to Revilo Oliver all of section 33; to John Oliver lot 5 in the northeast quarter of section 5 and lot 5 in the northwest quarter of section 5, and the east half of lot 5 in the northeast quarter of sec-

tion 6, township 25, north, range 8, east of the third principal meridian, containing 120 acres more or less; and to Florence Ross lot 1 in the northeast quarter of section 6 and lot 1 in the northwest quarter of section 5, township 25, north, range 8, east of the third principal meridian, containing 160 acres more or less; all the above lands being situated in Livingston county, with the provision that all of the property was to remain in the custody and control of Revilo, with full power to collect all rents until he should have paid off all the mortgages and indebtedness. This will was signed in the presence of her sons, Revilo and John. July 6, 1908, a holographic codicil was added, which reads:

"To my administrators, Warren and Nathan Goodell: If I should die before the mortgage is paid, help Revilo get my property back and divide as stated in this my last will.

AMARETTA OLIVER."

There is also in the record the following instrument:

"STATE OF TEXAS, }
Wichita County. } ss.

"This indenture witnesseth, that the grantor, Amaretta Oliver, (a widow,) of the village of Iowa Park, in the county of Wichita and State of Texas, for the consideration of love and affection and one dollar and other good and valuable consideration, the receipt of which is hereby acknowledged, convey and quit-claim to Flora Oliver, of the town, county and State aforesaid, the following described real estate, to-wit:

"All of section thirty-three (33), in township twenty-six (26), north, range eight (8), east of the third principal meridian; also lot one (1) in the northwest quarter ($\frac{1}{4}$) of section five (5), and lot one (1) in the northeast quarter ($\frac{1}{4}$) of section six (6), and lot five (5) in the northwest quarter ($\frac{1}{4}$) of section five (5), and the east half ($\frac{1}{2}$) of lot five (5) in the northeast quarter ($\frac{1}{4}$) of section six (6), in township twenty-five (25), north, range eight (8), east of the third principal meridian, situated in the county of Livingston and State of Illinois.

"My son Revilo Oliver being the actual owner of the above described property and I having held the record title in trust for him, it is my desire and intention to convey all the right, title and interest I have in said property to Revilo's wife, Flora Oliver.

"Signed, sealed and delivered this 25th day of October, A. D. 1907.

AMARETTA OLIVER. (Seal)"

"STATE OF TEXAS, }
Wichita County. } ss.

"Before me, the undersigned, a notary public in and for Wichita county, Texas, on this day personally appeared Amaretta Oliver, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged that she signed, sealed and delivered the said instrument as her free and voluntary act, for the purposes and considerations therein expressed.

"Given under my hand and official seal this 25th day of October, A. D. 1907.

C. C. DAVIS,

(Seal) Notary Public, Wichita County, Texas.

"My commission expires May 31, 1909."

The instrument was recorded in the recorder's office of Livingston county, Illinois, July 31, 1914.

Early in January, 1908, Florence Ross went from her home in Momence, Illinois, to Iowa Park, Texas. This was the first time Florence had seen her mother for many years. She represented to her mother that Revilo's wife was an evil, designing woman, seeking to get hold of her property, and that she was worse than Maud Barlow, the prostitute Revilo first married. On the 27th day of January, 1908, she secured a deed conveying section 33 to herself, and a second deed conveying 142 acres of the Germanville lands to her brother, John Oliver. On the same day there was executed a will by Amaretta Oliver which devised to Revilo a life interest in about 200 acres of the Germanville lands. The remainder in fee of this land was devised to John Oliver. All the rest and residue of her estate was by this will devised to Florence Ross. The above deeds were acknowledged before W. R. Ferguson, a notary public of Wichita county, Texas. May 5, 1908, Amaretta Oliver executed the following notice of ownership:

"STATE OF TEXAS, }
Wichita County. } ss.

Notice of Ownership.

"Take notice, all men, by these presents, that I, Amaretta Oliver, of Iowa Park, in the county of Wichita and State of Texas, do hereby certify and give notice to every person or to whomever it may concern, that I claim the legal title to and am the lawful owner of the following described property: All of section thirty-three (33), town twenty-six (26), north, range eight (8), east of

the third principal meridian, containing six hundred and forty acres (640) more or less, situated in the county of Livingston and State of Illinois; and that a certain deed dated on or about January 27th, 1908, and now on record in said Livingston county, Illinois, purporting to be a conveyance from me to one Florence Ross, of Newton county, Indiana, was procured by fraud and misrepresentation and without consideration of any kind whatsoever, and unless said Florence Ross re-conveys said property to me without litigation I will file a bill in chancery to have said fraudulent conveyance set aside and said property restored to me, as the law provides in such cases.

"Dated at Iowa Park, Texas, this 5th day of May, A. D. 1908.
AMARETTA OLIVER."

This instrument was signed and acknowledged before W. R. Ferguson, notary public of Wichita county, Texas, May 5, 1908, and was recorded in Livingston county, Illinois, May 8, 1908. There was executed at the same time and recorded at the same time a general power of attorney authorizing Revilo Oliver to attend to all her legal and financial affairs. The instrument above set out, together with a few other deeds and wills, shows the condition in which Amaretta Oliver left the title to her property.

March 3, 1910, Revilo Oliver filed his bill in the circuit court of Livingston county, Illinois, setting out his claims and rights under the lien on section 33 by virtue of the \$64,000 note, alleging, among other things, that he had for a number of years leased the land in his own name and had improved the same; that he had otherwise exercised all rights of ownership over the land for a long period of time, and that his title to the land had not been disputed until January 27, 1908, when Florence Ross, his sister, through fraudulent, false and corrupt means procured a conveyance of section 33 to herself from Amaretta Oliver, her mother, a woman then seventy-six years old and feeble and unsound in mind and body. He prayed for cancellation of this deed and for an injunction against Florence Ross from interfering with his tenants and his rights in the land. The bill was later amended, joining John Oli-

ver as a party defendant. Florence Ross answered that Revilo Oliver was not the owner of section 33, but that, on the contrary, Amaretta Oliver had been continuously the owner from 1887 to 1908; that the conveyance from Amaretta Oliver to Revilo Oliver on October 13, 1897, was a mere accommodation conveyance and that no consideration passed; that at that time Revilo was about to marry Maud Barlow, and that Maud Barlow, under the pretense that her brothers would give her valuable land they were holding in trust for her if she could show them she was marrying a man of wealth, prevailed upon Amaretta Oliver to deed section 33 to Revilo temporarily and to deliver the deed to her, so that she might show the same to her brothers and then return it to Amaretta without its being placed on record; that in violation of her agreement Maud Barlow placed this deed on record October 21; that on October 15, for a stated consideration of \$48,000, Revilo re-deeded this section to Amaretta. Further answering, she denied the execution of the promissory note of \$64,000 and alleged it to be a forgery; alleged that the leasing of the lands in the name of Revilo and his collection of the rent were done merely as an agent of Amaretta, and that such other acts as were done in his name were done as agent and not as owner; denied that Amaretta Oliver was on the 27th of January, 1908, incapacitated to make the deed and denied that said deed was obtained by fraud or undue influence, and averred that said deed was a valid transfer of the property. John Oliver answered that he was not informed of the transactions between Amaretta Oliver and Revilo Oliver, but averred that a receiver should be appointed for the land and that the deed from Amaretta Oliver to Florence Ross should be set aside.

June 30, 1910, John Oliver filed his cross-bill, alleging that Amaretta Oliver died August 11, 1908, the owner in fee of section 33, in township 26, north, range 8, east of the third principal meridian, in the county of Livingston

and State of Illinois, and left surviving her as her only heirs-at-law her two sons, Revilo and John, and her daughter, Florence Ross; that Amaretta Oliver died testate, leaving as her last will and testament a will executed September 8, 1904, with a codicil attached July 6, 1908; that this will was admitted to probate in Wichita county, Texas, at the December, 1909, term of the county court; that the will was proven by the testimony of Revilo and John, both devisees, and that their testimony not being corroborated, they could take nothing under the terms of the will; that he was therefore the owner in fee of the undivided one-third part of section 33 as tenant in common with Revilo Oliver and Florence Ross; that Florence Ross on the 27th day of January, 1908, obtained from Amaretta Oliver by false and fraudulent means a deed purporting to convey to her this section 33; that at that time Amaretta Oliver was seventy-six years of age, sick, feeble and unsound in mind and body by reason of both disease and old age, and that she was then incapable, both mentally and physically, of handling, managing and transacting her business affairs or of executing a conveyance of said lands. He prayed that the deed might be set aside and that the property pass as intestate property, and that the court should by decree vest in him the undivided one-third of section 33 as tenant in common with Revilo Oliver and Florence Ross. Answers were filed to this cross-bill.

On June 26, 1911, Revilo Oliver filed an amended bill, bringing into the cause the Germanville land, alleging ownership of the undivided one-half of it by virtue of the trust agreement heretofore set out, and carrying back his claim of ownership to section 33 to two certain sheriff's deeds heretofore referred to, and asserting as to section 33 his open and continuous possession and undisturbed management and control, payment of taxes and discharge of mortgages, improvements and betterments from 1881 to 1908. Answers were filed, denying these claims.

Additional amended bills and answers were filed, putting in issue the validity of every instrument executed by Amaretta Oliver, and the matter was finally referred to the master to take testimony. While it appears in the record in a number of places that there was a reference to the master the order of reference does not appear, and it will be presumed that the master was directed to take evidence on all the bills, amended bills, cross-bills and answers.

On July 17, 1914, the master filed his report, finding that on January 27, 1908, Amaretta Oliver was the owner of section 33; also lot 1 in the northwest quarter of section 5, lot 1 in the northeast quarter of section 6, lot 5 in the northwest quarter of section 5, and the east half of lot 5 in the northeast quarter of section 6; that by procurement of defendant Florence Ross, Amaretta Oliver executed on that date two deeds, one to Florence Ross for section 33 and the other to John Oliver conveying 142 acres of the other lands described; that Amaretta Oliver was then aged, feeble, not of sound mind or memory and under the domination of defendant Ross, who procured said deeds by false and fraudulent representations concerning Revilo Oliver and his wife, Flora, and by undue influence over Amaretta Oliver; that complainant, Revilo Oliver, lived with his mother from his birth until her death; that practically all of her business was transacted by him as her agent; that their profits and losses were large and so badly mixed that it could not be determined whose money was used for any purpose; that there were many conveyances to and fro between them without consideration and that no faith was given by either of them to any of said conveyances; that Revilo Oliver was not entitled to a vendor's lien by reason of Amaretta Oliver's execution of the \$64,000 note; that the note was without consideration; that Amaretta Oliver held no part of the Germanville lands in trust for complainant; that by his conduct and acquiescence and contradicting claims he was estopped from claiming any

interest against his mother. The master recommended that by decree the deeds to Florence Ross and John Oliver of January 27, 1908, be set aside and declared null and void; that the prayer for a vendor's lien be denied and that Revilo's relief sought regarding the Germanville lands be denied. He recommended denial of other relief except in conformity with the above, and that the decree give title to all said lands in Amaretta Oliver at the time of her death, free of any interest or claim of complainant, legal or equitable. Objections were filed to this report both by the complainant, Revilo Oliver, and the defendants, Florence Ross and John Oliver. The objections were made exceptions by order of court and the matter was set down for hearing before the circuit court of Livingston county on April 12, 1915.

At this time there was brought forward the deed from Amaretta Oliver to Flora Oliver, by which she claimed to be the holder of the legal title to all of section 33 and about 345 acres of the Germanville land. It was claimed that this deed had not been brought forward before this time because it had been lost. Max Lang, brother of the present complainant, Flora Oliver, and who was living at North Milwaukee, Wisconsin, claimed that he found the deed in January, 1914, at his home, in a trunk, among some sheet music belonging to his sister, Flora, and that he immediately mailed it to her. Revilo Oliver quit-claimed all his interest in these lands to his wife, Flora Oliver. She had this deed from her husband and the quit-claim deed from Amaretta Oliver both recorded in the recorder's office of Livingston county on July 31, 1914. On April 19, 1915, the complainant, Flora Oliver, under order of court filed her amended supplemental bill, setting out all the matters and things claimed by her husband, Revilo Oliver, in his bill and amended bills, and setting out execution and delivery to her of the deed executed by Amaretta Oliver under date of October 25, 1907, and the deed given to her

by her husband under date of July 31, 1914, and averring that by the deed of her husband she had become his assignee and entitled to succeed to whatever benefits would have accrued to him had he not executed said deed, and explaining the loss of her deed and why it had not been brought forward earlier. Florence Ross and John Oliver filed separate answers, denying the existence of the deed given by Amaretta Oliver to the new complainant, Flora Oliver, and denying that it ever had any existence or that it was ever lost but alleging that it was a forgery. They further alleged that if Flora Oliver ever had any rights in the premises she was guilty of *laches* and should be estopped from asserting her title.

The master again considered the cause on the original bill, the amendments to the original bill, the supplemental bill and its amendments, the cross-bills and answers. February 17, 1917, the death of John Oliver was suggested, and his widow and children were made parties defendant and service was had upon such new defendants. On March 4, 1918, the master's report, with objections to the same, was filed, and the objections of Flora Oliver, Florence Ross and the heirs of John Oliver were overruled. The objections were made exceptions before the court and were there argued. The court sustained the exceptions of Florence Ross and held the deeds executed by Amaretta Oliver on January 27, 1908, good and delivered deeds and not made through any fraud or undue influence of any kind, and found that on said day Amaretta Oliver was of sound mind and memory and legally competent to make and execute said instruments. The decree further found that the \$64,000 note was not a valid obligation and was void; that the trust agreement was likewise not a valid obligation and was void; that the making and placing upon the record in the recorder's office of Livingston county of the alleged notice of ownership were not the free and voluntary acts of Amaretta Oliver; that said notice of ownership was

void, and that the instrument alleged to have been executed and delivered by Amaretta Oliver to Flora Oliver on October 25, 1907, was a forged instrument and therefore void. The court further found that Revilo Oliver had no rights in the lands which he purported to convey to his wife on July 31, 1914, and further found that, aside from the fact that the deed under which Flora Oliver claimed title to these lands was null and void, Flora Oliver was estopped from claiming any interest in said lands by reason of her remaining silent and permitting the litigation over these lands to be carried on with her knowledge for a number of years without asserting her claim. The decree therefore ordered the \$64,000 note, the trust agreement, the notice of ownership and the Flora Oliver deed canceled, and declared the title in fee simple confirmed in John Oliver and Florence Ross in accordance with the terms of the respective conveyances to them from Amaretta Oliver.

All of the testimony taken in this case was taken before the master in chancery. None of it was taken in open court. The master had some advantage in being able to see and hear practically all the witnesses, but the chancellor was in no better position to weigh the evidence than we are. Inasmuch, therefore, as the chancellor has not seen and heard the witnesses we are not bound by the rule that the finding of the chancellor will not be disturbed unless it is clearly and manifestly against the weight of the evidence. (*Larson v. Glos*, 235 Ill. 584.) As the supplemental bill was, in effect, but an amendment to the original bill, by which new matter which had transpired since the filing of the original bill was brought into the case, it formed a part of and was tried with the original case. *Mix v. Beach*, 46 Ill. 311.

The issue presented for us to determine is, which, if any, of the several writings alleged to have been executed by Amaretta Oliver are valid instruments of title. It is difficult to determine what part of the great mass of evi-

dence presented is true and what part is false. It is apparent that the testimony of Revilo Oliver and Florence Ross is not reliable and can only be believed where it is corroborated. Another difficulty presented to us is, that much of the testimony offered to corroborate their testimony is impeached and is likewise unreliable. We have examined with care the testimony in the record and the original instruments alleged to have been executed by Amaretta Oliver, and shall, generally speaking, pass upon them in the order they affect the title to the property.

If, as it is contended by Revilo, the mother held this property in trust for him, then the subsequent attempts by her to convey the fee simple title to this property were void. The record discloses that in addition to the property here in controversy Revilo and his mother had at times owned other property. All of this property seems to have been lost by Revilo by operations on the board of trade and in other ways, including a matrimonial venture. As was found by the master, it is impossible to tell just what the arrangement was between Revilo and his mother, but it is quite apparent that he occupied toward her a very pronounced fiduciary relation. Any transaction between them by which he would become the beneficiary would be looked upon with disfavor, and the burden would be on him to show that the dealing was had at arm's length. (*Kern v. Beatty*, 267 Ill. 127.) It is claimed that the \$64,000 note and the trust agreement were forgeries, but from a casual examination of this record it is apparent to anyone that forgery was unnecessary so long as Amaretta Oliver was alive, because she would sign anything that was presented to her for her signature. The transactions between Revilo and his mother with respect to this property do not appear to have been considered by them as binding, because of the inconsistent positions taken by each of them with respect to the several transactions. It is apparent that no consideration passed between Revilo and his mother for the trans-

fer of this property. When Revilo took the title, in 1881, to section 33 by virtue of the sheriff's deed, it was for two inconsiderable judgments against his father. It does not appear whether the money used to pay this small sum belonged to Revilo or his mother. In 1897, when this property was conveyed, first from the mother to Revilo and then from Revilo back to the mother, no money changed hands, though the expressed consideration was \$48,000. The evidence in this record is not sufficiently strong to overcome the presumption against the validity of the transfer of this property from the mother to Revilo, and so we hold that the chancellor did not err in decreeing that the trust agreement and the \$64,000 note were void.

It follows, therefore, that in October, 1907, when a deed from Amaretta Oliver to Flora Oliver purporting to convey all her interest in this property is alleged to have been made, Amaretta Oliver was the owner in fee of this land. The chancellor held that this alleged deed was a forgery and therefore void. The evidence on this subject is conflicting. Quite a number of witnesses testified that the signature of Amaretta Oliver to the deed was genuine, while other witnesses expressed the belief that it was not a genuine signature. It is the well established law of this State that where in a civil action a criminal act is charged in the pleadings the offense must be proved beyond a reasonable doubt. (*McInturff v. Insurance Co. of North America*, 248 Ill. 92.) This the evidence in this record fails to do. But regardless of whether this deed is a forgery or not, Flora Oliver is now estopped from claiming title to these lands. She claimed that this deed was executed in October, 1907, and delivered to her at that time; that when it was acknowledged before C. C. Davis he entered the fact in a notary record required by the law of Texas to be kept. We have examined the notary record of Davis and find that an erasure has been made at the place where this memorandum was entered. Davis explains this erasure, stating that

he started to write too large to get the description in the space provided and so he erased the matter already written and began over again. His explanation is unsatisfactory, because it is clear that a memorandum of a wholly different transfer had been previously entered in this space. Not only was the description of the land changed, but the dates were also changed. If the record of Davis was genuine there was no excuse for Flora Oliver not coming forward at once with her claim of ownership by virtue of an unrecorded deed. She had the testimony of Davis, together with his record, to support her testimony that such a deed had been executed. Instead of this, when Revilo Oliver on March, 3, 1910, with full knowledge of her claim under this unrecorded deed, averred that he was the true owner of all this land by virtue of certain deeds, trust agreements and lien notes, she sat by and without protest permitted this claim to be made against the land to which she now claims title. The record shows that she attended the hearings before the master and that no effort was made by her to present her claims under the suddenly discovered deed until after the master had made his findings adversely to the claims of her husband, Revilo. Estoppel may arise from silence as well as words where there is the duty to speak and the party on whom the duty rests has an opportunity to speak and knowing the circumstances keeps silent. It is the duty of a person having a right and seeing another about to commit an act infringing upon it, to assert his right. (*Milligan v. Miller*, 253 Ill. 511.) The party who challenges the title of his adversary to real property must be diligent in discovering that which will avoid the title and render it invalid and diligent in his application for relief. Unreasonable delay in explaining by equitable circumstances has always been declared evidence of acquiescence and will bar relief. (*Howe v. South Park Comrs.* 119 Ill. 101.) While the chancellor erred in holding that this deed was a forgery, yet he did not err in holding that Flora Oliver

was estopped from asserting her rights in this land. It is likewise apparent that even if this deed is not a forgery it was obtained by undue influence exercised over Amaretta Oliver by her son Revilo. Revilo and Flora Oliver were not married until July, 1907, and it is claimed this deed was executed in October, 1907. The record shows that Revilo was present at the time it was executed.

We now come to consider the deeds by which Florence Ross and John Oliver claimed title to a part of this land. John Oliver's position all the way through this litigation has been that his mother was incompetent to transact business and was subject to the undue influence of anyone who attempted to exercise his influence over her. He said that his mother had a weak and vacillating mind for several years before her death, and so stated in his cross-bill and in his answers to the several bills. As before stated, Florence Ross went to Texas early in January, 1908, and while there secured the deeds here in question. It appears that on the 27th of January she took her mother to Wichita Falls on the pretense of shopping, and while there these deeds and the will were executed. The first indications of a diseased mind were manifested by Amaretta Oliver as early as 1900, when, according to Dr. Carson, her family physician, she entertained the fear that she was going to be poisoned. She would take no medicine, even from him, unless Revilo was present and directed her that it was all right. Many witnesses from Texas testified to peculiar conduct on her part, especially during the months of December, 1907, and January and February, 1908. It appears that in November, 1907, she took part in extinguishing a prairie fire which she started and was overcome with exertion and fear. For several weeks after that she was very feeble in mind and body and never fully recovered. It was claimed that these deeds were not delivered because Amaretta Oliver continued to exercise control over them and did not intend that they should be delivered until her death. This is

manifested by the notice of ownership which she prepared and filed in Livingston county. It is apparent from this notice of ownership that the disposition made by the deeds did not please her and that she did not intend that they should be effective. This is also manifested by letters from her to different people and by the holographic codicil to her will. The disposition of the property made in these deeds and by the will executed at the same time is altogether inconsistent with all previous and future declarations of Amaretta Oliver with respect to the disposition of her property. It is undisputed that Amaretta had continually declared to her neighbors, as well as to the family, that Revilo was to have section 33 after her death, and it seemed to be her plan during the last years of her life that Revilo was to have section 33 and John about two-thirds and Florence about one-third of the Germanville lands. Florence had been given Amaretta's interest in an estate of Amaretta's brother Sol, in Indiana. This amounted to about \$20,000. There is no dispute in the record that Amaretta held Revilo in great esteem and had great affection for him. This disposition of her property is not supported by any evidence whatever in the record excepting the testimony of Florence Ross. A clear preponderance of the evidence shows that the execution of these deeds and this will was secured by the false representations and the undue influence of Florence Ross. We have in the record the declaration of such fact by Amaretta Oliver, evidenced by the notice of ownership which she acknowledged before Ferguson and filed of record in Livingston county, by the codicil of July 6, 1908, and by letters written by her after the execution of the deeds. It is apparent that at the time these deeds were executed Florence Ross was the dominant party, and her mother was, as she had been for years, subject to the influence of a stronger mind.

The chancellor erred in holding these deeds valid. He should have sustained the master's findings that on Au-

gust 11, 1908, Amaretta Oliver died the owner in fee simple of all the lands here in question, and that all the deeds, trust agreements and other instruments in writing held by her children were void and of no force and effect.

The decree of the circuit court is therefore reversed and the cause remanded, with directions to modify the decree, holding the deeds executed on January 27, 1908, void and ordering the same canceled, and declaring the fee simple title to said property in Flora Oliver, (grantee of Revilo Oliver,) Florence Ross and the heirs-at-law of John Oliver, deceased, as tenants in common.

Reversed and remanded, with directions.

INDEX.

ABATEMENT.	PAGE.
death of either party abates suit for divorce.....	260
ACCOUNTING.	
director of corporation seeking to enforce an adverse interest must prove consent of all stockholders.....	157
when court will not enforce equities against stockholders of corporation nor between directors.....	158
ACTIONS AND DEFENSES.	
foreign corporation must comply with conditions for transacting business before bringing action in Illinois.....	81
when a false representation is actionable—false assertions as to value are generally not actionable.....	142
what not a defense to the charge of forging name of the defendant's employer	184
garnishee may question jurisdiction of the court in original proceeding	194
instruction that defense of alibi merely creates a reasonable doubt is improper.....	308
what defense is available under the general issue in a suit on bond	383
stockholder of corporation cannot secure appointment of receiver to defeat action by the creditors.....	413
when defense that a creditor of corporation is estopped to question sale by receiver cannot be set up by demurrer..	414
charge for the care of dependent girls in industrial schools is a claim fixed by law, for which suit may be brought against county	433
assumpsit may be brought against a municipality for failure to perform duty enjoined by law.....	433

ACTIONS AND DEFENSES.— <i>Continued.</i>	PAGE.
when judgment debtor is not estopped to set up inadequacy of price and irregularity of judicial sale.....	508
fact that vendee obtained money for payments by illegal sale of liquor is no defense to specific performance of contract to convey.....	538
information in nature of <i>quo warranto</i> is a civil remedy—when individual may prosecute information to protect private rights	556

AGENCY.—See PRINCIPAL AND AGENT.

AMENDMENTS.—See STATUTES.	
when a decree may be amended.....	261
when court may amend form of verdict at subsequent term	383
when objection to taxes may be amended.....	455

APPEALS AND ERRORS.

judgment of conviction cannot be reversed because counsel for defendant failed to exercise skill.....	11
whether there is evidence tending to support the cause of action for negligence is question of law.....	111
no appeal lies from order of county court approving certificate of completion of local improvement.....	121
when Supreme Court cannot weigh evidence.....	142
to sustain judgment against garnishee, issue and return of execution in original proceeding must be shown....	194
when <i>nunc pro tunc</i> order for filing a bill of exceptions is proper	195
the trial court's rulings in sustaining objections to separate items in a tax levy cannot be questioned by filing cross-errors	283
when the Appellate Court should recite finding of facts in its judgment	320
when record should recite that it contains all the instructions given or evidence heard.....	340
appeal or writ of error does not vacate judgment—a writ of error does not vacate award under Workmen's Compensation act	515
Supreme Court has no jurisdiction as to lands of owners who have not appealed from annexation of their lands to drainage district	556
when record shows the indictment was returned into open court—Supreme Court will not weigh credibility of witnesses whose testimony is conflicting.....	582
appellate jurisdiction of the Supreme Court is within control of the General Assembly except in certain cases...	608

APPEALS AND ERRORS.—*Continued.*

PAGE.

section 121 of Practice act, as to right of review, is not unconstitutional	608
proviso to section 121 of Practice act applies to chancery cases—when jurisdiction of Supreme Court is not determined by amount of judgment.	608
when proviso to section 121 of Practice act applies although bill seeks to remove fraudulent conveyance. . . .	608
the Supreme Court does not take judicial notice of ordinance—denial of motion to dismiss writ of error does not cure omission from the record.	605
when Supreme Court is not bound by finding of chancellor on conflicting evidence.	624

ASSUMPSIT.—See ACTIONS AND DEFENSES.

ATTORNEYS AT LAW.

fact that attorney who drew will is a subscribing witness does not affect weight of his testimony in contest case. .	301
when criminal case will not be reversed because of inexperience of counsel for defendant.	490
attorney for purchaser at judicial sale cannot testify from recollection how property was sold.	508
when testimony of an attorney for plaintiff in ejectment is sufficient to show possession in defendant.	528

AUTOMOBILES.—See MOTOR VEHICLES.

BAILMENTS.

when inn-keeper is gratuitous bailee—degree of care required of a gratuitous bailee.	320
what is meant by ordinary diligence—bailor must prove negligence of the bailee.	320

BANKS.

what is not an unlawful seizure of defendant bankers' books of account.	72
defendant bankers are not protected from introduction of books of account to which they are no longer entitled. .	72
when evidence is sufficient to show defendant was an officer of a bank—when assistant cashier is guilty of embezzlement as a principal.	72
what evidence of value of defendant's property is admissible on trial of insolvent banker—when banker is presumed to have known he was insolvent.	276

BANKS.—Continued.

PAGE.

- money accepted as deposit by insolvent banker need not be described if value is alleged and proved..... 276
- evidence of collection of checks accepted as a deposit by insolvent banker is not necessary..... 276
- jury may decide upon punishment by imprisonment for a violation of section 25a of Criminal Code..... 276
- what is meant by currency—checks are *prima facie* of the value for which drawn..... 277

BENEFIT SOCIETIES.—See INSURANCE.

- when receiver may be appointed to protect assets of foreign corporation 40
- court appointing receiver of property of foreign corporation may retain jurisdiction to determine rights of individual creditors 40

BILLS AND NOTES.

- what is meant by currency—checks are *prima facie* of the value for which drawn..... 277

BILLS OF EXCEPTIONS.—See APPEALS AND ERRORS.

- when *nunc pro tunc* order for filing bill is proper..... 195

BILLS OF REVIEW.

- when death of complainant in separate maintenance can not be made basis of bill to review decree—when bills of review may be allowed..... 260
- bill of review for newly discovered matters rests in discretion of court 261
- what is essential to a bill of review for newly discovered evidence 261

BONDS.

- when application for indemnity bond forms part of contract—what defense is available under general issue... 383
- surety on bond required by statute is bound by judgment in accordance with statute—process..... 570
- items taxed as costs cannot be questioned in collateral suit against surety 570

BROKERS.

- when motion for an instructed verdict is properly denied—what evidence is admissible to show terms of a brokerage contract 444

BROKERS.—Continued.	PAGE.
burden is on broker suing for commissions to prove his contract—when instruction should not refer to ordinary brokerage contract	444
unearned commissions cannot be subjected to claim of a judgment creditor	458
BUILDING LINES.	
restriction will be enforced if the intent is clearly manifested—erection of fence defeating purpose of building line restriction is not permitted.....	190
BULK SALES ACT.—See SALES.	
BURDEN OF PROOF.	
bailor must prove negligence of the bailee.....	320
claimant under Compensation act has burden of proving deceased's contributions for support.....	330
burden is on employer under Compensation act to prove employment was casual.....	423
burden is on the broker suing for commissions to prove his contract	444
an objector to tax has burden of showing failure to give notice of increase in valuation.....	455
burden is on claimant under Compensation act to prove accident arose out of and in the course of employment...	484
charge that deed is a forgery must be proved beyond reasonable doubt	624
CARRIERS.—See RAILROADS.	
the relation of carrier and passenger continues while passenger on street railway makes transfer.....	25
one who has alighted from street car at end of journey ceases to be a passenger.....	25
what degree of care street railway company must exercise over passenger making transfer—when doctrine of <i>res ipsa loquitur</i> may be applied.....	25
CHOSSES IN ACTION.	
what is a chose in action—a present right of action is not necessary—a judgment creditor may acquire a lien on chose in action	458
unearned commissions cannot be subjected to claim of a judgment creditor	458
CITIES.—See MUNICIPAL CORPORATIONS.	

CLOUD ON TITLE.

PAGE.

equity appointing trustee for sale of real estate has jurisdiction to remove cloud..... 222

COLLATERAL ATTACK.—See JUDGMENTS AND DECREES.

CONDEMNATION.—See EMINENT DOMAIN.

CONSIDERATION.—See DEEDS; CONTRACTS.

CONSTITUTIONAL LAW.

legislature cannot exercise judicial power..... 173
 ordinance in the exercise of police power is presumed to be valid 206
 when ordinance requiring automatic sprinklers does not give arbitrary power to city officer..... 207
 an ordinance tending to prevent fires is within the police power—exercise of police power may impair obligation of contracts 207
 police power of the State is recognized by the Federal Supreme Court 207
 act requiring county to pay for maintenance of girls at industrial schools does not violate constitution..... 432
 act for care of girls at industrial schools does not impose a tax for local purpose—when General Assembly may impose tax on municipality..... 432
 a county is an agent of the State in the exercise of the police power 433
 limitation of power of city to levy taxes is not necessarily a limitation on power to contract a debt..... 433
 section 4 of the Uniform Sales law of 1915 is not invalid.. 532
 appellate jurisdiction of the Supreme Court is within control of the General Assembly except in certain cases.. 608
 section 121 of Practice act, as to right of review, is not unconstitutional 608

CONSTRUCTION.—See CONSTITUTIONAL LAW.

when proviso may be given effect as independent enactment 40
 of section 24 of Compensation act, as to when requirement of filing claim within six months does not apply..... 126
 of paragraph (d) of section 8 of the Compensation act, as to notice of claim where employee dies after returning to work 126
 what considered in seeking legislative intention—in construing a statute, court need not be confined to literal meaning of words used..... 126

CONSTRUCTION.—*Continued.*

	PAGE.
ambiguous language will be construed to prevent injustice.	127
of section 2 of Statute of Descent, as giving illegitimates inheritable blood at birth and not after mother's death..	135
of high school district validating act of 1917, as to when it does not apply.....	173
contracts will be construed, if possible, so as to give effect to the intention.....	190
of Bulk Sales act, as applying to sale of property used in theater business	194
meaning of deed is determined by facts existing at time of delivery	201
the construction sustaining an ordinance will be adopted, if possible	207
Compensation act should be liberally construed.....	233
of section 23 of Compensation act, as preventing release to insurance company which is primarily liable.....	233
of section 5 of Conveyances act, as authorizing creation of joint tenancies notwithstanding amendment of 1917...	242
repetition of old law in amendment is not enactment of new statute—old law is retained in amendatory act as originally construed	242
codicil must be construed with will.....	268
of amendment of 1917 to the Revenue act, as authorizing county clerk to extend levy of city tax to include amount necessary for playground purposes.....	282
of section 9 of Police Pension Fund act, as amended in 1917, as not being retrospective.....	282
act will not be given retrospective effect unless such intention is clearly shown.....	283
of the high school validating act of 1917, where district has been organized under general School law.....	335
of deed, as to when it is not a testamentary disposition...	347
of section 7f of Compensation act, as amended in 1915, as applying only where an employer pays the compensation voluntarily	353
of section 19 of Compensation act, as not requiring claim for death to be presented by administrator.....	353
pre-existing law should be considered in ascertaining intent of legislature.....	372
of amendment of 1905 to section 59 of Local Improvement act, as allowing public hearing before work is done....	372
of sections 2 and 5 of act for enjoining keeping of houses of prostitution, as to meaning of word "defendant".....	462
when word "children" in will will be construed to include adopted child—testator is presumed to have intended to dispose of all his estate.....	468

CONSTRUCTION.—*Continued.*

PAGE.

of statute adopted from another State.....	475
of section 4 of Uniform Sales act, as not amending the Statute of Frauds—when an act is not amendatory of previous law	532
meaning of term “in contemplation of death”.....	543
of proviso to section 121 of Practice act, as applying to chancery cases	608
of proviso to section 121 of Practice act, as to when it applies though bill seeks to remove fraudulent conveyance.	608
of term “any judgment creditor,” in section 20 of statute on judgments and decrees.....	617
statutes of redemption should be liberally construed.....	617

CONTEMPT.

order of court having jurisdiction must be obeyed until set aside or reversed.....	176
sufficiency of bill for injunction cannot be determined on hearing of a contempt charge.....	176

CONTRACTS.—See SPECIFIC PERFORMANCE.

option contract without consideration is only a continuing offer	90
when Supreme Court cannot weigh evidence—when false representation is actionable.....	142
false assertions as to value are generally not actionable...	142
when director of corporation acquires an adverse interest by assignment of royalty contract.....	157
contracts will be construed, if possible, so as to give effect to the intention.....	190
the exercise of police power may impair the obligation of contracts	207
when an application for indemnity bond forms part of the contract	383
what evidence admissible to show terms of brokerage contract—burden is on the broker suing for commissions to prove his contract.....	444
when an instruction should not refer to ordinary brokerage contract	444

CONVEYANCES.—See DEEDS.

CORPORATIONS.

court appointing receiver of property of foreign benefit association may retain jurisdiction to determine rights of individual creditors.....	40
---	----

CORPORATIONS.—*Continued.*

PAGE.

when receiver may be appointed to protect assets of foreign benefit association.....	40
foreign inter-State railroad corporation must comply with foreign Corporations act.....	81
foreign railroad corporation operating under act of 1899 must comply with act of 1905.....	81
foreign railroad corporation's petition for condemnation must show compliance with laws of Illinois.....	81
foreign corporation must comply with conditions for transacting business before bringing action in Illinois.....	81
what necessary to give court jurisdiction <i>in personam</i> over foreign corporation	99
when soliciting business in State will not render foreign corporation subject to its jurisdiction.....	99
what necessary to render statute making solicitors agents of insurance companies applicable to foreign corporation	99
directors of corporation occupy position of trustees for stockholders—directors cannot take advantage of their position for personal gain.....	157
when a director cannot buy corporate obligations at discount and enforce payment in full.....	157
when director acquires an adverse interest by assignment of royalty contract.....	157
director seeking to enforce an adverse interest must prove consent of all stockholders.....	157
knowledge of stockholders is necessary before <i>laches</i> can defeat their rights.....	157
majority of directors or stockholders cannot ratify their own breach of trust by directors.....	158
when court will not enforce equities against stockholders nor between directors.....	158
effect where deed to corporation contains condition subsequent contrary to act of incorporation.....	289
when appointment of a receiver may be attacked collaterally—equity has only statutory power of appointment... ..	413
courts are not inclined to appoint receiver merely to preserve assets, on application of stockholders.....	413
stockholder cannot secure appointment of receiver to defeat action by the creditors.....	413
appointment of receiver to distribute assets is equal to dissolution of corporation—when rule of <i>caveat emptor</i> applies to sale by receiver.....	414
when defense that a creditor is estopped to question sale by receiver cannot be set up by demurrer.....	414
when assignment, absolute on its face, is fraudulent as to creditors of corporation.....	579

COSTS.

PAGE.

- items taxed as costs cannot be questioned in collateral suit
against surety on cost bond. 570

COUNTIES.

- act requiring county to pay for maintenance of girls at industrial schools does not violate constitution. 432
county is an agent of State in exercise of police power.. 433
charge for the care of dependent girls in industrial schools is a claim fixed by law, for which suit may be brought against county 433
legal claims fixed by law cannot be defeated by a failure to make appropriations 433

COURTS.—See APPEALS AND ERRORS; JURISDICTION.

CREDITORS.—See DEBTOR AND CREDITOR.

CRIMINAL LAW.

- court is justified in reprimanding counsel who makes many frivolous objections II
jury may be instructed to use their best judgment as reasonable men in weighing evidence..... II
an instruction should not be worded to encourage the jury to disagree II
judgment of conviction cannot be reversed because counsel for defendant failed to exercise skill..... II
counsel should state facts showing necessity for continuance of hearing of motion for new trial..... 12
court exercises discretion in delaying hearing of motion for new trial..... 12
newly discovered evidence must be conclusive to justify a new trial—courts are not required to rely on affidavits on motion for new trial..... 12
what is not an unlawful seizure of the defendants' books of account 72
the defendants are not protected from the introduction of books of account to which they are no longer entitled... 72
when evidence is sufficient to show defendant was an officer of bank—when party is guilty as a principal..... 72
forgery is committed by making false instrument with the intent to defraud..... 184
the intent to defraud may be presumed from the circumstances proven 184
when instruction does not assume defendant was contradicted—defendant cannot complain that instruction does not define word "forge"..... 184

CRIMINAL LAW.—*Continued.*

PAGE.

entries by agent in his books are not admissible in his defense against charge of forgery.....	184
what not a defense to the charge of forging name of the defendant's employer	184
when question of admissibility of complaint of prosecutrix is waived—when evidence of unchastity of prosecutrix is admissible	218
when there is no abuse of discretion in sentencing a defendant to penitentiary rather than to reformatory.....	218
when entries made in course of business must be proved correct—what necessary to sustain allegation of ownership in carrier.....	249
what evidence of value of defendant's property is admissible on trial of insolvent banker.....	276
when banker is presumed to have known that he was insolvent—questions not presented to Appellate Court can not be raised in Supreme Court.....	276
money accepted as deposit by insolvent banker need not be described if value is alleged and proved.....	276
evidence of collection of checks accepted as a deposit by insolvent banker is not necessary.....	276
the jury may decide upon punishment by imprisonment for violation of section 25a of Criminal Code.....	276
section 6 of division 14 of the Criminal Code applies where jury decides upon punishment by imprisonment.....	277
when a judgment of conviction will be reversed on evidence—the record should be free from error where evidence is close.....	308
when it is imperative that jury be accurately instructed—instruction that defense of alibi merely creates reasonable doubt is improper.....	308
witnesses should testify to actual facts to prove criminal negligence—intent to kill not necessary in manslaughter.	339
an indictment for manslaughter may charge willful negligence—question of criminal negligence is one of fact for the jury.....	339
driver upon public highway must exercise reasonable care to prevent injury.....	339
when negligence becomes criminal—what is improper in State's attorney's argument in the trial of driver of a motor vehicle	339
when record should recite that it contains all the instructions given or evidence heard.....	340
when judgment of conviction will not be reversed on evidence—when case will not be reversed because of inexperience of counsel for defendant.....	490

CRIMINAL LAW.—*Continued.*

PAGE.

- what evidence is proper to show motive in homicide—when evidence as to meaning of foreign words used by defendant is proper..... 490
- when evidence of another distinct offense is competent—one instruction may refer to another..... 491
- instruction quoting sections 148 and 149 of Criminal Code correctly states law of self-defense..... 491
- when a new trial will not be granted for newly discovered evidence 491
- when record shows an indictment was returned into open court—Supreme Court will not weigh credibility of witnesses whose testimony is conflicting..... 582

CROSS-ERRORS.—See APPEALS AND ERRORS.

DEBTOR AND CREDITOR.

- when receiver may be appointed for foreign corporation.. 40
- doctrine of marshaling of assets stated..... 53
- conveyance in fraud of creditors is void only as to complaining creditor 148
- conveyance in fraud of marital rights places wife in position of defrauded creditor..... 149
- the Bulk Sales act applies to sale of property used in the theater business 194
- stockholder cannot secure appointment of receiver to defeat action by the creditors..... 413
- when defense that a creditor of corporation is estopped to question sale by receiver cannot be set up by demurrer.. 414
- what is a chose in action—a present right of action is not necessary—a judgment creditor may acquire a lien on chose in action..... 458
- unearned commissions cannot be subjected to claim of a judgment creditor 458
- when judgment debtor is not estopped to set up inadequacy of price and irregularity of judicial sale..... 508
- when an assignment absolute on its face is fraudulent as to creditors 579
- when purchaser at master's sale cannot object to right of another creditor to redeem..... 617
- meaning of term "any judgment creditor," in section 20 of statute on judgments and decrees..... 617
- judgment need not be a lien on land to give right of redemption from execution sale..... 617

DECREES.—See JUDGMENTS AND DECREES.

DEEDS.

PAGE.

the true consideration in a deed may be shown by parol evidence	52
what is included in a conveyance—conveyance of coal, oil and gas carries right to use necessary parts of surface..	91
a conveyance in fraud of creditors is void only as to the complaining creditor	148
wife defrauded by husband's deed cannot set it aside as his residuary devisee.	148
what rights are protected against a conveyance in fraud of marital rights	148
rights as heir or devisee are not protected against a conveyance in fraud of marital rights.	148
conveyance in fraud of marital rights places wife in position of defrauded creditor.	149
statutory form of warranty deed conveys fee simple—remainder cannot take effect in abridgment of particular precedent estate	200
when estate subject to conditional limitations is not a life estate with remainders.	200
when rule that a gift over will not take effect unless contingency happens during preceding estate does not apply	201
meaning of deed is determined by facts existing at time of delivery	201
definition of duress—mere annoyance will not constitute..	222
trust deed is not ratified when duress under which it was executed continues to operate.	222
section 5 of Conveyances act authorizes creation of joint tenancies notwithstanding the amendment of 1917.	242
what is a condition subsequent—condition contrary to law or public policy is void—effect where condition is void..	289
effect where deed to corporation contains condition subsequent contrary to act of incorporation.	289
delivery is essential to operation of deed—question of delivery is one of intention of grantor.	295
what necessary to constitute delivery—intention to deliver may be shown either by direct or presumptive evidence.	295
when decree setting aside deed will not be reversed.	295
remainder in fee may be limited after termination of life estate—when deed is not a testamentary disposition.	347
when remainder is vested although subject to be reduced by exercise of power.	347
trustee takes no larger estate than the nature of the trust requires	348
when conveyance of property in trust for grantor's children is not subject to inheritance tax.	475

DEEDS.—*Continued.*

PAGE.

transfer will be taxed where deed was manifestly intended to evade Inheritance Tax act.....	475
clause of revocation in conveyance in trust does not render deed testamentary.....	475
Inheritance Tax act does not apply unless conveyance is testamentary or in contemplation of death.....	542
intention of grantor determines delivery of deed—deed, to be delivered, must pass beyond grantor's control.....	564
when grantor may retain deed in his possession—when delivery to third person passes title to grantee—delivery of deed must be unconditional.....	564
subsequent conduct of grantor cannot affect delivery, once completed—when acceptance of deed is presumed.....	612
subsequent change of intention of the grantor cannot affect delivery	612
when a deed absolute on its face is a mortgage.....	617
beneficiary must prove parties dealt at arm's length where fiduciary relation exists.....	624
charge that deed is a forgery must be proved beyond reasonable doubt	624
when deeds and a will should be set aside.....	625

DESCENT.

rights of inheritance of illegitimates depend solely on section 2 of Statute of Descent.....	135
section 2 of the Statute of Descent gives illegitimates inheritable blood at birth and not after mother's death....	135
mother and her legitimate children cannot inherit to the exclusion of her illegitimate children.....	135

DIVORCE.

suit for divorce is of a personal nature—death of either party abates suit	260
--	-----

DRAINAGE.

when drainage commissioners must reconstruct and maintain bridge over highway.....	378
road commissioners have no authority to release drainage commissioners from obligation to restore bridge.....	378
commissioners may make additional assessment if without funds to re-build bridge.....	378
one land owner cannot object that land of another was not properly annexed to district.....	556
the Supreme Court has no jurisdiction as to lands of owners who have not appealed.....	556

DURESS.—See DEEDS.

EASEMENTS.

PAGE.

- building line restriction will be enforced if the intent is clearly manifested 190
- erection of a fence defeating purpose of building line restriction is not permitted..... 190

EJECTMENT.

- when testimony of an attorney for plaintiff is sufficient to show possession in defendant..... 528
- a homestead estate does not arise from mere fact of ownership—when copy of demand for possession may be admitted in evidence..... 528

EMBEZZLEMENT.

- what is not an unlawful seizure of the defendants' books of account 72
- defendants are not protected from introduction of books of account to which they are no longer entitled..... 72
- when evidence is sufficient to show defendant was an officer of a bank—when party is guilty as a principal..... 72

EMINENT DOMAIN.

- foreign railroad corporation's petition for condemnation must show compliance with laws of Illinois..... 81
- petition must show right to condemnation—right of condemnation is based upon the interest and convenience of the public 81
- fair cash market value is correct measure of damages for land taken—jury cannot ignore the evidence in fixing compensation and damages..... 520
- in determining fair cash market value jury should consider the rental value..... 520

EMPLOYMENT.—See WORKMEN'S COMPENSATION.

EQUITY.

- affirmative relief in equity cannot be given on answer—when answer need not be stricken as asking affirmative relief 52
- equity appointing trustee for sale of real estate has jurisdiction to remove cloud..... 222
- the courts of chancery have only statutory power to appoint receivers 413

EQUITY.—Continued.**PAGE.**

- proviso to section 121 of the Practice act applies to chancery cases 608
- when proviso to section 121 of the Practice act applies although bill seeks to remove fraudulent conveyance..... 608

ESTOPPEL.

- when fraud is established under the doctrine of estoppel by verdict 149
- when defense that creditor of corporation is estopped to question sale by receiver cannot be set up by demurrer.. 414
- when judgment debtor is not estopped to set up inadequacy of price and irregularity of judicial sale..... 508
- estoppel may arise from omission to assert right—when wife is estopped to assert title..... 624
- party challenging title to real property must be diligent in discovering its invalidity..... 624

EVIDENCE.

- newly discovered evidence must be conclusive to justify new trial 12
- the true consideration in a deed may be shown by parol evidence 52
- defendant bankers are not protected from introduction of books of account to which they are no longer entitled... 72
- when evidence is sufficient to show defendant was an officer of a bank..... 72
- evidence of rate of speed of vehicle is admissible under count charging negligence of the driver..... 169
- when evidence in an action for wrongful death must show the deceased was in the exercise of ordinary care for his own safety 169
- entries by agent in his books are not admissible in his defense against charge of forgery..... 184
- statement in affidavit for garnishment process that execution was issued and returned "no property found" is not evidence of the fact..... 194
- when question of admissibility of complaint of prosecutrix is waived—when evidence of unchastity of prosecutrix is admissible 218
- what necessary to sustain allegation of ownership in carrier in prosecution for larceny..... 249
- when entries made in course of business must be proved correct 249
- what evidence of value of defendant's property is admissible on trial of insolvent banker..... 276

EVIDENCE.—*Continued.*

PAGE.

intention to deliver deed may be shown either by direct or presumptive evidence.....	295
fact that attorney who drew will is subscribing witness does not affect the weight of his testimony in contest case..	301
what letters should not be admitted in evidence in a will contest case	301
presumption as to payment of money is one of fact.....	331
witnesses should testify to actual facts to prove criminal negligence in trial for manslaughter.....	339
when an expert witness may testify that insanity resulted from injuries	401
what evidence is admissible to show terms of a brokerage contract	444
expert evidence is to be treated as other evidence in workmen's compensation cases.....	449
how expert testimony should be weighed—when the court should not disregard testimony of expert witnesses....	449
what evidence is proper to show motive in homicide—when evidence as to meaning of foreign words used by defendant is proper	490
when evidence of another distinct offense is competent—when new trial will not be granted for newly discovered evidence	491
attorney for purchaser at judicial sale cannot testify from recollection how property was sold.....	508
when testimony of attorney for plaintiff in ejectment is sufficient to show possession in defendant.....	528
when copy of demand for possession may be admitted in evidence in ejectment suit.....	528
when purported copies of abstracts of title should not be admitted in evidence in proceeding to register title....	576
when a person is presumed to be dead—when a person is presumed to be living.....	587
proper attestation clause is <i>prima facie</i> evidence of due execution of will.....	596
Supreme Court does not take judicial notice of ordinance. charge that deed is a forgery must be proved beyond a reasonable doubt	624

EXECUTORS AND ADMINISTRATORS.

section 19 of Workmen's Compensation act does not require claim for death to be presented by administrator..	353
appointment of administrator by probate court cannot be attacked in workmen's compensation proceeding.....	587

FEES AND SALARIES.

PAGE.

\$2500 is maximum salary of State's attorneys in counties
not exceeding 30,000 population..... 535

FENCES.—See BUILDING LINES; RAILROADS.

FIDUCIARY RELATIONS.—See DEEDS; WILLS.

FOREIGN CORPORATIONS.—See CORPORATIONS.

FORGERY.

forgery is committed by making false instrument with the
intent to defraud..... 184
the intent to defraud may be presumed from circumstances
proven 184
entries by agent in his books are not admissible in his de-
fense against charge of forgery..... 184
what not a defense to the charge of forging name of the
defendant's employer 184
defendant cannot complain that instruction does not de-
fine word "forge"..... 184
charge that deed is a forgery must be proved beyond rea-
sonable doubt 624

FORMER CASES.

McLaughlin v. Industrial Board, 281 Ill. 100, explained, as
to when employee engaged in constructing hard road is
under Compensation act..... 49
Bushnell v. Industrial Board, 276 Ill. 262, distinguished, as
to filing notice of claim where employee dies after re-
turning to work..... 126
Weskalnies v. Hesterman, 288 Ill. 199, followed, in hold-
ing the Bulk Sales act applicable to sale of property in
theater business 194
Buck v. Garber, 261 Ill. 378, criticised, as to when an es-
tate subject to conditional limitations is not a life estate
with remainders 200
Lachenmyer v. Gehlbach, 266 Ill. 11, distinguished, as to
when rule that gift over will not take effect unless con-
tingency happens during preceding estate does not apply. 201
Mette v. Feltgen, 148 Ill. 357, followed, in holding section 5
of the Conveyances act authorizes creation of joint ten-
ancies notwithstanding amendment of 1917..... 242
Victor Chemical Works v. Industrial Board, 274 Ill. 11,
distinguished, as to whether there is presumption that
payment was for support of parent..... 330

FORMER CASES.—Continued.

PAGE.

<i>Smith-Lohr Coal Co. v. Industrial Com.</i> 286 Ill. 34, followed, as to when section 7f of the Compensation act applies	353
<i>People v. Weigley</i> , 155 Ill. 491, followed, as to whether stockholder may secure appointment of receiver to defeat action by the creditors	413
<i>Dunn v. Chicago Industrial School</i> , 280 Ill. 613, followed, as to whether act requiring county to pay for maintenance of girls at industrial schools is valid	432
<i>People v. Blevins</i> , 251 Ill. 381, distinguished, as to when criminal case will not be reversed because of inexperience of counsel for defendant	490
<i>Schnier v. People</i> , 23 Ill. 11, followed, as to when evidence of the meaning of foreign words is proper	490
<i>Smith v. County of Logan</i> , 284 Ill. 163, followed, as to what is maximum salary of State's attorneys in counties not exceeding 30,000	535
<i>Ellis v. Dumond</i> , 259 Ill. 483, distinguished, as to whether party taking under a will is precluded from questioning devise which is void	560
<i>Elliott v. Murray</i> , 225 Ill. 107, followed, in holding delivery of deed must be unconditional	564

FRAUD.

when a false representation is actionable—false assertions as to value are generally not actionable	142
conveyance in fraud of creditors is void only as to the complaining creditor	148
wife defrauded by husband's deed cannot set it aside as his residuary devisee	148
what rights are protected against a conveyance in fraud of marital rights	148
rights as heir or devisee are not protected against a conveyance in fraud of marital rights	148
conveyance in fraud of marital rights places wife in position of defrauded creditor	149
when fact of fraud is established under doctrine of estoppel by verdict	149
forgery is committed by making false instrument with intent to defraud—the intent to defraud may be presumed from circumstances proven	184
section 4 of Uniform Sales act does not amend the Statute of Frauds	532
when an assignment absolute on its face is fraudulent as to creditors	579
when deeds and a will should be set aside	625

GARNISHMENT.

PAGE.

statutory conditions to issuance of a garnishment process are essential to jurisdiction.....	194
affidavit that execution was issued and returned "no property found" is not evidence of the fact.....	194
a garnishee may question jurisdiction of court in original proceeding—when garnishee may be subrogated to the rights of lienholders.....	194
to sustain judgment against garnishee, issue and return of execution must be shown.....	194
when assignment absolute on its face is fraudulent as to creditors	579

GUARANTORS.

when plaintiff does not lose benefit of contract of guaranty by alleging it to be one of indemnity.....	570
to stand back of agreement is contract of guaranty—guarantor is liable only according to terms of his contract...	570
holder of guaranty is not bound to institute legal proceedings against debtor.....	570
surety on bond required by statute is bound by judgment in accordance with statute—process.....	570
items taxed as costs cannot be questioned in collateral suit against surety	570

HIGHWAYS.

when employee engaged in constructing hard road is not under Compensation act	49
driver upon public highway must exercise reasonable care to prevent injury	339
when drainage commissioners must reconstruct and maintain bridge over public highway.....	378
road commissioners have no authority to release the drainage commissioners from obligation to restore a bridge..	378
drainage commissioners may make additional assessment if without funds to re-build bridge.....	378

HOMESTEAD.

a homestead estate does not arise from the mere fact of ownership	528
---	-----

HOUSES OF ILL-FAME.

keeper of a house of prostitution may be enjoined from maintaining such house within jurisdiction of court....	462
meaning of word "defendant," in sections 2 and 5 of act for enjoining keeping of houses of prostitution.....	462

HUSBAND AND WIFE.—See SEPARATE MAINTENANCE.

- wife defrauded by husband's deed cannot set it aside as his residuary devisee 148
- when former decree limiting relief to present rights is not *res judicata* of subsequent bill..... 148
- what rights are protected against a conveyance in fraud of marital rights..... 148
- rights as heir or devisee are not protected against a conveyance in fraud of marital rights..... 148
- conveyance in fraud of marital rights places wife in position of defrauded creditor..... 149
- when fact of fraud is established under doctrine of estoppel by verdict 149
- suit for divorce is of a personal nature—death of either party abates suit 260
- when wife cannot assert title to land claimed by husband. 624

ILLEGITIMATES.—See DESCENT.**INDICTMENTS.**

- indictment for manslaughter may charge willful negligence. 339
- when the record shows an indictment was returned into open court 582

INHERITANCE TAX.

- Federal estate tax should be deducted before computing State inheritance tax..... 475
- when conveyance of property in trust for grantor's children is not subject to tax..... 475
- transfer will be taxed where deed was manifestly intended to evade statute..... 475
- Inheritance Tax act does not apply unless conveyance is testamentary or in contemplation of death..... 542
- purpose of taxing such transfers as are made in contemplation of death..... 542
- meaning of term "in contemplation of death"—when gift is made in contemplation of death..... 543
- what circumstances may be considered in determining whether gift is made in contemplation of death..... 543

INJUNCTION.

- when court has jurisdiction to issue an injunction—circuit court has jurisdiction to issue injunction in labor dispute 176
- sufficiency of bill for injunction cannot be determined on hearing of a contempt charge..... 176
- keeper of a house of prostitution may be enjoined from maintaining such house within jurisdiction of court.... 462

INJURIES.

PAGE.

- Compensation act takes away action for wrongful death of employee—proceedings for wrongful death are statutory—parties 353

INN-KEEPERS.—See BAILMENTS.

INSOLVENCY.—See DEBTOR AND CREDITOR.

INSTRUCTIONS.

- jury may be instructed to use their best judgment as reasonable men in weighing evidence in criminal case. II
 instruction in criminal case should not be worded to encourage jury to disagree. II
 when an instruction does not assume that the defendant was contradicted 184
 in prosecution for forgery, defendant cannot complain that instruction does not define word "forge". 184
 when it is imperative that the jury be accurately instructed in criminal case. 308
 instruction that defense of alibi merely creates a reasonable doubt is improper. 308
 when decree in will contest case will not be reversed because of inaccuracies in instructions. 392
 when an instruction should not refer to ordinary brokerage contract 444
 one instruction may refer to another—instruction quoting sections 148 and 149 of Criminal Code correctly states law of self-defense. 491

INSURANCE.—See BENEFIT SOCIETIES.

- when soliciting business in State will not render foreign corporation subject to its jurisdiction. 99
 what necessary to render statute making solicitors agents of insurance companies applicable to foreign corporation. 99
 when the Industrial Commission may make award against insurance company 233
 section 23 of Compensation act prevents release to insurance company which is primarily liable. 233
 dissolution of partnership does not necessarily render policy void—waiver 233

INTOXICATING LIQUORS.

- fact that vendee obtained money for payments by illegal sale of liquor is no defense to specific performance of contract to convey. 538

JOINT TENANCIES.

PAGE.

section 5 of Conveyances act authorizes creation of joint tenancies notwithstanding amendment of 1917..... 242

JUDGMENTS AND DECREES.

foreign judgment may be contradicted for the want of jurisdiction 99
 when former decree limiting wife's relief to present rights is not *res judicata* of subsequent bill..... 148
 when a judgment or a decree is conclusive..... 149
 when a decree may be amended..... 261
 when appointment of receiver may be attacked collaterally. 413
 appeal or writ of error does not vacate judgment..... 515
 what is collateral attack upon judgment of confirmation of special tax..... 550
 judgment of confirmation of special tax cannot be collaterally attacked except for want of jurisdiction..... 550
 judgment against a municipality binds the tax-payers.... 551
 surety on bond required by statute is bound by judgment in accordance with statute—process..... 570
 items taxed as costs cannot be questioned in collateral suit against surety on cost bond..... 570
 circuit court may exercise discretion on motion to vacate judgment in workmen's compensation case..... 601
 when jurisdiction of Supreme Court is not determined by amount of judgment 608
 meaning of term "any judgment creditor," in section 20 of statute on judgments and decrees..... 617
 judgment need not be lien on land to give right of redemption from execution sale..... 617

JUDICIAL NOTICE.

Supreme Court does not take judicial notice of ordinance. 605

JUDICIAL SALES.

application of rule of sale of mortgaged property in inverse order of alienation..... 52
 when rule of *caveat emptor* applies to sale by receiver of a corporation 414
 the inadequacy of price, together with other irregularities, may justify relief against sale on execution..... 508
 attorney for a purchaser cannot testify from recollection how property was sold..... 508
 when land levied on by sheriff should be offered for sale in separate tracts..... 508
 when judgment debtor is not estopped to set up inadequacy of price and irregularity of sale..... 508

JUDICIAL SALES.— <i>Continued.</i>	PAGE.
when purchaser at master's sale cannot object to right of another creditor to redeem.....	617
judgment need not be a lien on land to give right of redemption from execution sale.....	617
when holder of certificate of sale is not entitled to be reimbursed for taxes and expenses.....	617

JURISDICTION.

foreign judgment may be contradicted for want of jurisdiction—what necessary to give the court jurisdiction <i>in personam</i> over foreign corporation.....	99
when soliciting business in State will not render foreign corporation subject to its jurisdiction.....	99
jurisdiction is not lost by erroneous decision—when court has jurisdiction to issue an injunction.....	176
circuit court has jurisdiction to issue injunction in labor dispute—order of the court having jurisdiction must be obeyed until set aside or reversed.....	176
statutory conditions to issuance of a garnishment process are essential to jurisdiction.....	194
garnishee may question jurisdiction of the court in original proceeding.....	194
equity appointing trustee for sale of real estate has jurisdiction to remove cloud.....	222
judgment of confirmation of special tax cannot be collaterally attacked except for want of jurisdiction.....	550
statute gives county court jurisdiction to determine every question relating to special tax.....	550
what is jurisdiction of subject matter.....	551
Supreme Court has no jurisdiction as to lands of owners who have not appealed from annexation of their lands to drainage district.....	556
appellate jurisdiction of the Supreme Court is within control of the General Assembly except in certain cases....	608
when jurisdiction of Supreme Court is not determined by amount of judgment.....	608

LACHES.

knowledge of stockholders of corporation is necessary before <i>laches</i> can defeat their rights.....	157
---	-----

LARCENY.

what necessary to sustain the allegation of ownership in the carrier	249
--	-----

LIENS.

PAGE.

- when garnishee may be subrogated to rights of lienholders. 194
- judgment creditor may acquire a lien on chose in action—
unearned commissions cannot be subjected to claim of
judgment creditor 458
- judgment need not be a lien on land to give right of re-
demption from execution sale..... 617

LIMITATIONS.

- Statute of Limitations does not apply where violation of
ordinance is a continuing offense..... 206

LOCAL IMPROVEMENTS.—See SPECIAL ASSESSMENTS;
SPECIAL TAXATION.

MANSLAUGHTER.

- intent to kill is not necessary in manslaughter—indictment
for manslaughter may charge willful negligence..... 339

MASTER AND SERVANT.—See WORKMEN'S COMPENSA-
TION.

- what is necessary to deprive employer of defense of con-
tributory negligence of an employee..... 427
- when an accident arises out of employment—when an ac-
cident occurs in the course of employment..... 427
- act of procuring lunch is incidental to employment..... 427

MINES.

- options for the purchase of coal rights may be enforced—
when option for purchase of coal rights is not within
rule against perpetuities..... 90
- conveyance of coal, oil and gas carries right to use neces-
sary parts of surface..... 91

MORTGAGES.

- when answer need not be stricken as asking affirmative
relief—application of the rule of sale in inverse order
of alienation 52
- true consideration in a deed may be shown by parol evi-
dence—when the doctrine of marshaling of assets may
be applied 52
- doctrine of marshaling of assets stated..... 53
- when purchaser at master's sale cannot object to right of
another creditor to redeem..... 617
- when a deed absolute on its face is a mortgage..... 617

MOTOR VEHICLES.

PAGE.

witnesses should testify to actual facts to prove criminal negligence—the question of criminal negligence is one of fact for jury in trial for manslaughter.....	339
driver upon public highway must exercise reasonable care to prevent injury—when negligence becomes criminal..	339
what is improper in State's attorney's argument in trial of driver of motor vehicle.....	339

MUNICIPAL CORPORATIONS.—See SPECIAL ASSESSMENTS.

when buildings may be considered as one structure under ordinance for prevention of fire.....	206
Statute of Limitations does not apply where violation of ordinance is a continuing offense.....	206
ordinance may be proper exercise of police power although it results in inconvenience to individual.....	206
ordinance in the exercise of police power is presumed to be valid	206
construction sustaining ordinance will be adopted, if possible—ordinance tending to prevent fires is within the police power	207
when ordinance requiring automatic sprinklers does not give arbitrary power to city officer.....	207
county clerk may extend levy of city tax to include amount necessary for playground purposes under amendment of 1917 to Revenue act.....	282
corporate authorities have discretionary power in estimating amount of taxes required each year.....	282
when a city is not liable for negligent acts of its officers—when a city is liable for failure to keep its streets in a safe condition	400
a city acts ministerially in removing obstructions from the streets—city cannot allow streets to be incumbered with dangerous awnings	400
act for care of girls at industrial schools does not impose a tax for local purpose—when General Assembly may impose tax on municipality.....	432
a county is an agent of the State in the exercise of the police power	433
charge for care of dependent girls in industrial schools is a claim fixed by law, for which suit may be brought against county	433
limitation on power to levy is not necessarily a limitation on power to contract a debt.....	433
assumpsit may be brought against a municipality for failure to perform duty enjoined by law.....	433

MUNICIPAL CORPORATIONS.—*Continued.* PAGE.

legal claims fixed by law cannot be defeated by failure to make appropriations	433
city may consent to make up deficiency of special tax and submit to judgment of confirmation.....	550
judgment against a municipality binds the tax-payers.....	551

MURDER.

what evidence is proper to show motive—when evidence as to the meaning of foreign words used by the defendant is proper.....	490
instruction quoting sections 148 and 149 of Criminal Code correctly states law of self-defense.....	491

NEGLIGENCE.—See WORKMEN'S COMPENSATION.

the relation of carrier and passenger continues while passenger on street railway makes transfer.....	25
one who has alighted from street car at end of journey ceases to be a passenger.....	25
what degree of care street railway company must exercise over passenger making transfer.....	25
statement of the doctrine of <i>res ipsa loquitur</i> —when the doctrine of <i>res ipsa loquitur</i> may be applied.....	25
statement of counsel that defendant will be reimbursed for payment of damages is improper.....	63
whether there is evidence tending to support a cause of action is question of law.....	III
when failure to comply with ordinance imposes no liability.	III
when failure to fence tracks of railroad is not proximate cause of injury.....	III
whether evidence tends to show that certain negligence was proximate cause of injury is question of law.....	III
when notice to erect fences is essential to liability of railroad company for failure to fence tracks.....	III
evidence of rate of speed of vehicle is admissible under count charging negligence of the driver.....	169
when evidence must show the deceased was in exercise of ordinary care for his own safety.....	169
bailor must prove negligence of the bailee.....	320
witnesses should testify to actual facts to prove criminal negligence—the question of criminal negligence is one of fact for jury in trial for manslaughter.....	339
driver upon public highway must exercise reasonable care to prevent injury—when negligence becomes criminal..	339
the question whether insanity resulted from injuries is for the jury—when a city is not liable for negligent acts of its officers	400

NEGLIGENCE.—*Continued.*

PAGE.

when a city is liable for failure to keep its streets in safe condition—city acts ministerially in removing obstructions from streets.....	400
city cannot allow dangerous awnings upon streets.....	400
when an expert witness may testify that insanity resulted from injuries	401
what necessary to deprive employer who has rejected Compensation act of defense of contributory negligence of employee.....	427

NEW TRIAL.

counsel should state facts showing necessity for continuance of hearing of motion for new trial.....	12
court exercises discretion in delaying hearing of motion for new trial of criminal case.....	12
newly discovered evidence must be conclusive to justify new trial—courts are not required to rely on affidavits on motion for new trial.....	12
a new trial is a <i>de novo</i> hearing.....	81
when a new trial will not be granted for newly discovered evidence	491

OPTIONS.—See SPECIFIC PERFORMANCE.

ORDINANCES.—See MUNICIPAL CORPORATIONS.

when failure to comply with ordinance imposes no liability	111
an ordinance for city taxes must specify purposes of appropriations	550
Supreme Court does not take judicial notice of ordinance.	605

PARTIES.

effect of amendment of statute changing party who shall sue for wrongful death.....	353
---	-----

PARTNERSHIP.

dissolution of partnership does not necessarily render insurance policy void—waiver.....	233
--	-----

PENSIONS.

section 9 of Police Pension Fund act, as amended in 1917, is not retrospective	282
--	-----

PLAYGROUNDS.

county clerk may extend levy of city tax to include amount necessary for playground purposes under amendment of 1917 to Revenue act.....	282
--	-----

PLEADING.—See INDICTMENTS.

PAGE.

affirmative relief in equity cannot be given on answer— when an answer need not be stricken as asking affirmative relief	52
evidence of rate of speed of vehicle is admissible under count charging negligence of the driver.....	169
when death of complainant in separate maintenance can not be made basis of bill to review decree—when bills of review may be allowed.....	260
bill of review for newly discovered matters rests in dis- cretion of court	261
what is essential to bill of review for newly discovered evidence	261
when allegations relating to undue influence should not be stricken from bill to contest will.....	301
what defense is available under the general issue in suit on bond	383
when defense that creditor of corporation is estopped to question sale by receiver cannot be set up by demurrer..	414
filing replication admits plea to be good in law.....	617
when a supplemental bill forms a part of original case...	624

POLICE.—See PENSIONS.

POLICE POWER.

ordinance may be proper exercise of police power although it results in inconvenience to individual.....	206
ordinance exercising police power is presumed valid.....	206
an ordinance tending to prevent fires is within the police power—exercise of police power may impair obligation of contracts	207
police power of the State is recognized by the Federal Supreme Court	207
a county is an agent of the State in the exercise of the police power	433

POWERS.

power of disposition is not larger than estate devised un- less clearly indicated.....	268
when remainder is vested although subject to be reduced by exercise of power.....	347

PRACTICE.

counsel should state facts showing necessity for continu- ance of hearing of motion for new trial.....	12
court exercises discretion in delaying hearing of motion for new trial of criminal case.....	12

PRACTICE.—*Continued.*

	PAGE.
courts are not required to rely on affidavits on motion for new trial	12
counsel has no right to "badger" a witness—when court should act promptly in stopping misconduct of counsel..	63
a new trial is a <i>de novo</i> hearing.....	81
sufficiency of bill for injunction cannot be determined on hearing of a contempt charge.....	176
when <i>nunc pro tunc</i> order for filing a bill of exceptions is proper	195
when hearing before master on question of solicitor's fees is improper—when a decree may be amended.....	261
when the Appellate Court should recite finding of facts in its judgment	320
when court may amend form of verdict at subsequent term	383
denial of motion to dismiss a writ of error does not cure omission from the record.....	605
section 121 of Practice act, as to right of review, is not unconstitutional	608
proviso to section 121 of the Practice act applies to chancery cases	608
when proviso to section 121 of the Practice act applies although bill seeks to remove fraudulent conveyance.....	608

PRESUMPTIONS.

in forgery the intent to defraud may be presumed from circumstances proven	184
an ordinance in exercise of police power is presumed to be valid	206
when there is no presumption that payment was for support of parent in workmen's compensation case.....	330
presumption as to payment of money is one of fact.....	331
a testator is presumed to have intended to dispose of all his estate	468
when a person is presumed to be dead—when to be living..	587
when acceptance of deed is presumed.....	612

PRINCIPAL AND AGENT.

entries by agent in his books are not admissible in his defense against charge of forgery.....	184
what not a defense to the charge of forging name of the defendant's employer	184

PROCESS.

statement in affidavit for garnishment process that execution was issued and returned "no property found" is not evidence of the fact.....	194
--	-----

PROCESS.—*Continued.*

PAGE.

statutory conditions to issuance of a garnishment process are essential to jurisdiction.....	194
when judgment on bond binds surety although he is not served with process.....	570

PROSTITUTION.—See HOUSES OF ILL-FAME.

QUO WARRANTO.

information in nature of <i>quo warranto</i> is a civil remedy— when individual may prosecute information to protect private rights	556
---	-----

RAILROADS.

foreign inter-State railroad corporation must comply with foreign Corporations act.....	81
foreign railroad corporation operating under act of 1899 must comply with the act of 1905.....	81
a foreign railroad corporation's petition for condemnation must show compliance with laws of Illinois.....	81
when failure to fence tracks of railroad is not proximate cause of injury.....	111
when notice to erect fences is essential to liability of rail- road company for failure to fence tracks.....	111
when, only, can right of way be assessed for paving street.	407
increase in freight traffic cannot be considered in assessing benefits to right of way in special assessment proceeding	407

RAPE.

when question of admissibility of complaint of prosecutrix is waived—when evidence of unchastity of prosecutrix is admissible	218
when there is no abuse of discretion in sentencing a de- fendant to penitentiary rather than to reformatory.....	218

RATIFICATION.

majority of directors or stockholders of corporation can not ratify their own breach of trust.....	158
trust deed is not ratified when duress under which it was executed continues to operate.....	222

REAL PROPERTY.—See DEEDS; WILLS; EJECTMENT.

section 5 of Conveyances act authorizes creation of joint tenancies notwithstanding the amendment of 1917.....	242
party challenging title to real property must be diligent in discovering its invalidity.....	624

RECEIVERS.—See CORPORATIONS.

REDEMPTION.—See JUDICIAL SALES.	PAGE.
meaning of term "any judgment creditor," in section 20 of statute on judgments and decrees.....	617
judgment need not be a lien on land to give right of redemption from execution sale.....	617
when holder of certificate of sale is not entitled to be reimbursed for taxes and expenses.....	617
statutes of redemption should be liberally construed.....	617

REGISTRATION OF TITLE.

when purported copies of abstracts of title should not be admitted in evidence.....	576
applicant must prove premises were vacant when application was filed	576

REMAINDERS.—See DEEDS; WILLS.

RES JUDICATA.

when former decree limiting wife's relief to present rights is not <i>res judicata</i> of subsequent bill.....	148
when a judgment or a decree is conclusive—what determines whether a matter is <i>res judicata</i>	149
when former decision supporting award under Workmen's Compensation act is <i>res judicata</i>	525

ROADS AND BRIDGES.—See HIGHWAYS.

SALES.—See JUDICIAL SALES; CONTRACTS.

Bulk Sales act applies to sale of property used in theater business	194
section 4 of Uniform Sales act does not amend the Statute of Frauds—section 4 of Uniform Sales act of 1915 is not invalid	532

SANITARIUMS.

when appropriation of tuberculosis sanitarium fund should be divided in ordinance.....	282
--	-----

SCHOOLS.

high school district organized under void act of 1911 is neither a <i>de jure</i> nor a <i>de facto</i> district—when validating act of 1917 does not apply.....	173
effect of validating act of 1917 where township high school district has been organized under general School law..	335

SCHOOLS.—*Continued.*

PAGE.

validity of an organization is not affected by a legislative change of boundaries.....	335
act requiring county to pay for maintenance of girls at industrial schools does not violate constitution.....	432
act for care of girls at industrial schools does not impose a tax for local purpose.....	432
charge for the care of dependent girls in industrial schools is a claim fixed by law, for which suit may be brought against county	433

SEPARATE MAINTENANCE.

dissolution of marriage relation extinguishes subject matter of suit—alimony <i>pendente lite</i> and solicitor's fees are incidental to the action.....	260
when death of complainant cannot be made basis of bill to review decree.....	260
when hearing before master on question of solicitor's fees is improper	261

SOLICITORS' FEES.

alimony <i>pendente lite</i> and solicitor's fees are incidental to action for separate maintenance.....	260
when hearing before master as to fees is improper.....	261

SPECIAL ASSESSMENTS.

no appeal lies from order of county court approving certificate of completion of local improvement.....	121
purpose of public hearing in the original proceeding—right to public hearing is a substantial right.....	372
amendment of 1905 to section 59 of Local Improvement act allows public hearing before work is done.....	372
when, only, can railroad right of way be assessed for paving street—property devoted to restricted use must be benefited for that use.....	407
increase in freight traffic cannot be considered in assessing benefits to right of way of railroad.....	407
property assessed need not abut upon the improvement...	407

SPECIAL TAXATION.

what is collateral attack upon judgment of confirmation—judgment of confirmation cannot be collaterally attacked except for want of jurisdiction.....	550
statute gives county court jurisdiction to determine every question relating to special tax.....	550
city may consent to make up deficiency and submit to judgment of confirmation.....	550

SPECIFIC PERFORMANCE.

PAGE.

options for the purchase of coal rights may be enforced— option contract without consideration is only a continu- ing offer	90
when sale to another party does not amount to notice of withdrawal of option.....	90
when option for purchase of coal rights is not within rule against perpetuities	90
a contract must be certain in all its provisions before the court will decree specific performance.....	91
fact that the vendee obtained money for payments by the illegal sale of liquor is no defense.....	538

STARE DECISIS.

when Federal Supreme Court must be followed to extent of overruling former decisions of the State court.....	99
---	----

STATUTE OF FRAUDS.—See FRAUD.

STATUTE OF LIMITATIONS.—See LIMITATIONS.

STATUTES.—See CONSTITUTIONAL LAW; CONSTRUCTION.

when proviso to a statute may be given effect as an inde- pendent enactment	40
what considered in seeking legislative intention—in con- struing a statute court need not be confined to literal meaning of words used.....	126
ambiguous language will be construed to prevent injustice.	127
repetition of old law in amendment is not enactment of new statute—old law is retained in amendatory act as originally construed	242
an act will not be given retrospective effect unless such intention is clearly shown.....	283
pre-existing law should be considered in ascertaining in- tent of legislature.....	372
construction of statute adopted from another State.....	475
when an act is not amendatory of previous law.....	532
statutes of redemption should be liberally construed.....	617

STREET RAILWAYS.

the relation of carrier and passenger continues while pas- senger on street railway makes transfer.....	25
one who has alighted from street car at end of journey ceases to be a passenger.....	25

STREET RAILWAYS.—*Continued.*

PAGE.

- what degree of care street railway company must exercise over passenger making transfer—when doctrine of *res ipsa loquitur* may be applied..... 25

STREETS AND ALLEYS.—See HIGHWAYS.

- when city is liable for failure to keep its streets in safe condition—city acts ministerially in removing obstructions from streets..... 400
- city cannot allow streets to be incumbered with dangerous awnings 400
- when, only, can railroad right of way be assessed for paving street 407

SUBROGATION.

- when garnishee may be subrogated to rights of lienholders 194

SURETIES.—See BONDS; GUARANTORS.

TAXES.—See INHERITANCE TAX.

- when appropriation of tuberculosis sanitarium fund should be divided in ordinance..... 282
- the county clerk may extend levy of city tax to include amount necessary for playground purposes under the amendment of 1917..... 282
- section 9 of Police Pension Fund act, as amended in 1917, is not retrospective..... 282
- county clerk in extending tax is limited to the tax levy ordinance 282
- corporate authorities have discretionary power in estimating amount of taxes required each year..... 282
- the burden is on the objector—the trial court's rulings in sustaining objections to separate items cannot be questioned by cross-errors 283
- act for care of girls at industrial schools does not impose a tax for local purpose—when General Assembly may impose tax on municipality..... 432
- limitation on power of municipality to levy is not necessarily a limitation on power to contract a debt..... 433
- legal claims fixed by law cannot be defeated by failure of county board to make appropriations..... 433
- when objection to taxes may be amended—objector has burden of showing a failure to give notice of increase in valuation 455
- ordinance for city taxes must specify purposes of appropriations—what is collateral attack upon judgment of confirmation of special tax..... 550

TAXES.—*Continued.*

	PAGE.
levies for water, electric lights and police and fire departments are for separate purposes.....	550
judgment of confirmation of special tax cannot be collaterally attacked except for want of jurisdiction.....	550
statute gives county court jurisdiction to determine every question relating to special tax.....	550
a city may consent to make up deficiency and submit to judgment of confirmation of special tax.....	550
judgment against a municipality binds the tax-payers.....	551

TOWNS.—See MUNICIPAL CORPORATIONS.

TRIAL.

court is justified in reprimanding counsel who makes many frivolous objections	11
statement of counsel that defendant will be reimbursed for payment of damages is improper.....	63
counsel has no right to "badger" a witness—when court should act promptly in stopping misconduct of counsel..	63
when misconduct of counsel will amount to mis-trial....	63
what is improper in State's attorney's argument in trial of driver of motor vehicle.....	339

TRUSTS.

equity appointing trustee for sale of real estate has jurisdiction to remove cloud.....	222
trust deed is not ratified when duress under which it was executed continues to operate.....	222
trustee takes no larger estate than the nature of the trust requires	348
resulting trust arises by operation of law—when a resulting trust arises—when evidence is not sufficient to establish resulting trust	365
when conveyance of property in trust for grantor's children is not subject to inheritance tax.....	475
clause of revocation in conveyance in trust does not render deed testamentary.....	475

UNDUE INFLUENCE.—See WILLS; DEEDS.

VERDICT.

when fact of fraud is established under doctrine of estoppel by verdict	149
when court may amend form of verdict at subsequent term	383
when motion for instructed verdict in suit on brokerage contract is properly denied.....	444

VILLAGES.—See MUNICIPAL CORPORATIONS.

WAIVER.

PAGE.

when an insurance company waives defense of dissolution of partnership	233
---	-----

WILLS.

wife defrauded by husband's deed cannot set it aside as his residuary devisee	148
rights as heir or devisee are not protected against a con- veyance in fraud of marital rights.....	148
equity appointing trustee for sale of real estate has juris- diction to remove cloud.....	222
codicil must be construed with will—power of disposition is not larger than estate devised unless clearly indicated.	268
remainder may be limited after a life estate in personal property—a life estate in money requires security from life legatee	268
when allegations relating to undue influence should not be stricken—what letters should not be admitted in evi- dence in a will contest case.....	301
fact that attorney who drew will is a subscribing witness does not affect the weight of his testimony.....	301
what does not tend to prove undue influence—what undue influence will invalidate a will.....	392
prejudice against relatives does not amount to insane delu- sion—age, sickness or debility will not, alone, affect ca- pacity to make will.....	392
when decree will not be reversed because of inaccuracies in instructions	392
testator is presumed to have intended to dispose of all his estate—when word "children" will be construed to in- clude adopted child.....	468
attesting witnesses need not sign in the presence of each other—proper attestation clause is <i>prima facie</i> evidence of due execution of will.....	596
when failure of recollection of the attesting witnesses will not preclude probate of will.....	596
one cannot ordinarily take under a will and against its terms—party taking under a will is not precluded from questioning devise which is void.....	560
when deeds and a will should be set aside because of un- due influence	625

WITNESSES.—See EVIDENCE.

WORDS AND PHRASES.

PAGE.

in a prosecution for forgery, defendant cannot complain that instruction does not define word "forge".....	184
definition of word "casual".....	423
meaning of word "defendant," in sections 2 and 5 of act for enjoining keeping of houses of prostitution.....	462
when word "children" in will will be construed to include adopted child	468
meaning of term "in contemplation of death".....	543
meaning of term "any judgment creditor," in section 20 of statute on judgments and decrees.....	617

WORKMEN'S COMPENSATION.

when employee engaged in constructing hard road is not employed in hazardous occupation.....	49
when a failure to give notice of an injury does not bar compensation	126
when requirement of section 24 of Compensation act as to filing written claim within six months does not apply...	126
effect of paragraph (d) of section 8 of Compensation act as to notice of claim where employee dies after returning to work.....	126
when the Industrial Commission may make award against insurance company—Compensation act should be liberally construed	233
section 23 of Compensation act prevents release to insurance company which is primarily liable.....	233
dissolution of partnership does not necessarily render insurance policy void—waiver.....	233
an applicant must prove loss of sight was caused by injury complained of	315
courts cannot determine the weight of evidence on controverted questions of fact.....	315
value of applicant's testimony as to previous condition of his eye	315
compensation cannot be awarded for total loss of eye if blindness is caused by pre-existing disease.....	315
claimant has burden of proving deceased's contributions for support—surviving parent need not have been dependent upon deceased employee.....	330
when there is no presumption that payment was for support of parent.....	330
what two courses are open to circuit court on review of proceedings of Industrial Commission.....	330
when circuit court should remand cause to the Industrial Commission	331

WORKMEN'S COMPENSATION.—*Continued.*

PAGE.

when employee's failure to observe directions for safety will not relieve employer of liability.....	353
filing of a claim with commission is sufficient if employer has notice	353
section 7f of Compensation act, as amended in 1915, applies only where employer pays compensation voluntarily	353
section 19 of Compensation act does not require claim for death to be presented by administrator.....	353
the Compensation act takes away action for the wrongful death of employee.....	353
burden is on employer to prove employment was casual—definition of word "casual".....	423
regularly recurring employment is not casual—when employment is casual.....	423
what necessary to deprive employer who has rejected the Compensation act of defense of contributory negligence of an employee.....	427
when an accident arises out of employment—when an accident occurs in the course of employment.....	427
act of procuring lunch is incidental to employment.....	427
what objection must be raised on the hearing—expert evidence is to be treated as other evidence.....	449
when circuit court may enter judgment for an award different from decision of Industrial Commission.....	449
burden is on claimant to prove accident arose out of and in the course of employment.....	484
injury to an employee while acting as a volunteer does not arise out of the employment—who is a volunteer.....	484
a writ of error does not vacate award—right to review award on ground that disability has increased or diminished is not affected by writ of error.....	515
when time for filing an application for review under paragraph (h) of section 19 of the Compensation act begins to run.....	515
when the former decision is <i>res judicata</i> —award fixed by Industrial Commission is not subject to review if within the statutory limit.....	525
appointment of administrator by probate court cannot be attacked in compensation proceedings.....	587
when the fact that beneficiaries are living is not sufficiently proved	587
when employment is casual.....	591
circuit court may exercise discretion on motion to vacate judgment	601

TABLE OF CASES

COMPRISING THE FORMER DECISIONS CITED, COMMENTED UPON OR
EXPLAINED IN THIS VOLUME.

A	PAGE.
Ackerson v. People, 124 Ill. 563.....	313
Ackman v. Potter, 239 Ill. 578.....	300
Adams v. Young, 200 Mass. 588.....	199
Addison v. People, 193 Ill. 405.....	19
Albaugh-Dover Co. v. Industrial Board, 278 Ill. 179.....	317
Aldrich v. People, 225 Ill. 610.....	253
Alexander v. Industrial Board, 281 Ill. 201.....	488
Allemania Fire Ins. Co. v. Peck, 133 Ill. 220.....	241
American Express Co. v. Parsons, 44 Ill. 312.....	281
American Steel Foundries v. Industrial Board, 284 Ill. 99.....	425
Amos v. American Trust and Savings Bank, 221 Ill. 100.....	300
Appel v. Chicago City Railway Co. 259 Ill. 561.....	68
Archibald v. Ott, 77 W. Va. 448.....	430
Arms v. Ayer, 192 Ill. 601.....	216, 214
Armstrong Co. v. Hudson Riv. R. R. Co. Ann. Cas. (1916E) 335	104
Armstrong Co. v. Hudson Riv. R. R. Co. L. R. A. (1916E) 232	107
Atchison, Top. and S. Fe R. R. Co. v. Schneider, 127 Ill. 144..	523
Aurora Brewing Co. v. Industrial Board, 277 Ill. 142.....	594

B	
Babbitt v. Grand Trunk Western Ry. Co. 285 Ill. 267.....	118
Babcock v. Farwell, 19 Am. & Eng. Ann. Cas. 91.....	46
Baber v. Pittsburg, Cin. and St. Louis R. R. Co. 93 Ill. 342...	612
Baer's Express Co. v. Industrial Board, 282 Ill. 44.....	594
Bailey v. Beall, 251 Ill. 577.....	307
Baker v. Hall, 214 Ill. 364.....	615, 567
Bale v. Chicago Junction Railway Co. 259 Ill. 476.....	71
Bales v. Elder, 118 Ill. 436.....	140, 139

	PAGE.
Bane v. Detrick, 52 Ill. 19.....	230
Barber v. Estate of Keiser, 279 Ill. 287.....	611
Barnard v. Springfield and Northeastern Trac. Co. 274 Ill. 148.....	107
Barnes & Co. v. Chicago Typographical Union, 232 Ill. 402....	183
Barnes & Co. v. Chicago Typographical Union, 232 Ill. 424....	180
Barry, <i>In re</i> Will of, 219 Ill. 391.....	600
Begbie v. Begbie, 128 Cal. 155.....	264
Beidler v. Crane, 135 Ill. 92.....	581
Bennett v. O'Brien, 37 Ill. 250.....	327
Benton, <i>In re</i> , 234 Ill. 366.....	547
Benton, City of, v. Blake, 263 Ill. 358.....	213
Berger v. Pacific R. R. Co. 9 L. R. A. (N. S.) 1214.....	107
Berry v. Lovi, 107 Ill. 612.....	512
Biffer v. City of Chicago, 278 Ill. 562.....	211
Big Muddy Coal and Iron Co. v. Industrial Board, 279 Ill. 235.....	516
Biggerstaff v. Biggerstaff, 180 Ill. 407.....	300
Birket v. City of Peoria, 185 Ill. 369.....	554
Bishop v. Hilliard, 227 Ill. 382.....	530, 307
Blake v. McClung, 172 U. S. 239.....	48, 46
Blake v. Ogden, 223 Ill. 204.....	299
Blankenship v. Hall, 233 Ill. 116.....	156
Pogan v. Swearingen, 199 Ill. 454.....	615
Bohen v. City of Waseca, 50 Am. Rep. 564.....	406
Bond v. Moore, 236 Ill. 576.....	203
Bonte v. Cooper, 90 Ill. 440.....	460
Bookout v. Bookout, 150 Ind. 63.....	156
Booz v. Texas and Pacific Ry. Co. 250 Ill. 376.....	106
Bostwick, <i>In re</i> , 160 N. Y. 489.....	483
Bostwick v. Hess, 80 Ill. 138.....	96
Botts v. Botts, (Ky.) 74 S. W. Rep. 1093.....	155
Bovee v. Hinde, 135 Ill. 137.....	567
Boyden v. Reed, 55 Ill. 458.....	268
Boyle v. Columbia Fireproofing Co. 182 Mass. 93.....	430
Bradley v. Jenkins, 276 Ill. 161.....	352
Brandenburg v. Lager, 272 Ill. 622.....	192
Bray v. Miles, 23 Ind. App. 432.....	474
Brinkley v. Brinkley, 128 N. C. 503.....	155
Bromwell v. Estate of Bromwell, 139 Ill. 424.....	364, 333
Brougher v. Lost Creek Drainage District, 277 Ill. 156.....	382
Brown v. People, 173 Ill. 34.....	280
Brown v. Pitney, 39 Ill. 468.....	562
Brummel v. Glos, 278 Ill. 552.....	578
Bruner v. Hicks, 230 Ill. 536.....	94
Buchanan v. McLennan, 192 Ill. 480.....	562
Buck v. Garber, 261 Ill. 378.....	203, 202, 201

	PAGE.
Bulliner v. People, 95 Ill. 394.....	21
Burden v. Burden, 124 Fed. Rep. 250.....	306
Burke v. Burke, 259 Ill. 262.....	352
Bushnell v. Industrial Board, 276 Ill. 262.....	134, 129
Byne v. City of Americus, 6 Ga. App. 48.....	406

C

Campbell v. People, 16 Ill. 17.....	505
Cantwell v. Harding, 249 Ill. 354.....	146
Carroll v. Drury, 170 Ill. 571.....	192
Carter v. Love, 206 Ill. 310.....	95
Cashman, <i>In re</i> Estate of, 134 Ill. 88.....	274
Cason v. City of Ottumwa, 102 Iowa, 99.....	406
Casparis Stone Co. v. Industrial Board, 278 Ill. 77.....	132
Central Garage v. Industrial Com. 286 Ill. 291.....	490, 488, 430
Chambers v. Chambers, 249 Ill. 126.....	141
Chattanooga Railway Co. v. Boddy, 105 Tenn. 666.....	33
Cheshire v. People, 116 Ill. 493.....	558
Chicago and Alton R. R. Co. v. Indus. Board, 274 Ill. 336..	333, 317
Chicago and Alton R. R. Co. v. Scott, 232 Ill. 419.....	69
Chicago and Alton R. R. Co. v. Winters, 175 Ill. 293.....	37, 32
Chicago, City of, v. Chicago and Northwest. Ry. Co. 278 Ill. 86.	411
Chicago, City of, v. Didier, 227 Ill. 571.....	406
Chicago, City of, v. Huleatt, 276 Ill. 466.....	375
Chicago, City of, v. Lehmann, 262 Ill. 468.....	523
Chicago, City of, v. Lord, 276 Ill. 357.....	523
Chicago, City of, v. Lord, 279 Ill. 167.....	527
Chicago, City of, v. Major, 18 Ill. 349.....	362, 359
Chicago, City of, v. Mandel Bros. 264 Ill. 206.....	211
Chicago, City of, v. Noonan, 210 Ill. 18.....	374
Chicago, City of, v. Oak Park Elevated R. R. Co. 261 Ill. 478..	213
Chicago, City of, v. Richardson, 213 Ill. 96.....	375, 374
Chicago, City of, v. Rogers Park Water Co. 214 Ill. 212.....	212
Chicago, City of, v. Seben, 165 Ill. 371.....	405
Chicago City Railway Co. v. Carroll, 206 Ill. 318.....	38, 34, 31
Chicago City Railway Co. v. Rood, 163 Ill. 477.....	35
Chicago and Eastern Illinois R. R. Co. v. Jennings, 190 Ill. 478.	37
Chicago and Eastern Illinois R. R. Co. v. Wiltse, 116 Ill. 449..	89
Chicago Great West. R. R. Co. v. Indus. Com. 284 Ill. 573..	594, 425
Chicago and Great W. R. R. Land Co. v. Peck, 112 Ill. 408..	62, 59
Chicago, Mil. and St. P. Ry. Co. v. Lake County, 287 Ill. 337..	440
Chicago and Northwestern Ry. Co. v. Galt, 133 Ill. 657.....	89
Chicago, Peoria and St. Louis Ry. Co. v. People, 214 Ill. 471..	456
Chicago, Rock Island and Pac. Ry. Co. v. Smith, 111 Ill. 363..	97
Chicago Union Traction Co. v. Giese, 229 Ill. 260.....	39, 35, 34

	PAGE.
Chicago Union Traction Co. v. Industrial Board, 282 Ill. 230..	519
Chicago Union Traction Co. v. Lauth, 216 Ill. 176.....	70, 69
Chicago Union Traction Co. v. Newmiller, 215 Ill. 383.....	35
Christian Hospital v. People, 223 Ill. 244.....	183, 181
Cincinnati, Indianap. and West. Ry. Co. v. People, 207 Ill. 566.	551
Cincinnati Mutual Health Assur. Co. v. Rosenthal, 55 Ill. 85..	88
Clark v. Burke, 163 Ill. 334.....	183
Clark v. Harper, 215 Ill. 24.....	581
Cochran v. Bailey, 271 Ill. 145.....	193
Cohen v. Menard, 136 Ill. 130.....	513, 512
Cole v. Littledale, 164 Ill. 630.....	266
Coles County v. Goehring, 209 Ill. 142.....	443
Colorado Springs and Can. City Ry. Co. v. Pettit, 37 Colo. 326.	33
Commercial Mut. Accident Co. v. Davis, 213 U. S. 245. 110, 105,	104
Commonwealth Edison Co. v. Industrial Board, 277 Ill. 74....	333
Connecticut Mut. Life Ins. Co. v. Spratley, 172 U. S. 602..	105, 104
Conway Co. v. Industrial Board, 282 Ill. 313.....	129
Coon v. McNelly, 254 Ill. 39.....	471
Coquard v. National Linseed Oil Co. 171 Ill. 480.....	420
Court Rose Foresters of America v. Corna, 279 Ill. 605... 182,	181
Cowen v. Failey, 149 Ind. 382.....	47
Cox v. Railway Conductors Co-operative Ass'n, 194 Mich. 213.	110
Cox v. Spurgin, 210 Ill. 398.....	59
Craig v. Royal Ins. Co. 8 B. W. C. C. 339.....	239
Crandall, Matter of, 196 N. Y. 127.....	264
Creamer v. West End Railway Co. 166 Mass. 320.....	33
Culver v. Waters, 248 Ill. 163.....	362
Culver Lumber Co. v. Culver, 81 Ark. 102.....	46
Cumins v. Wood, 44 Ill. 416.....	328
Curtis v. Root, 28 Ill. 367.....	518
Curtis v. Sage, 35 Ill. 22.....	399
Cusack Co. v. City of Chicago, 242 U. S. 526.....	217

D

Danforth v. Danforth, 111 Ill. 236.....	264
Daube v. Kuppenheimer, 272 Ill. 350.....	248
Davis v. McCullough, 192 Ill. 277.....	530
Day, <i>In re</i> , 181 Ill. 73.....	131
Day v. Graham, 1 Gilm. 435.....	513
Day v. Inhabitants of Milford, 5 Allen, 98.....	406
DeGraff v. Manz, 251 Ill. 531.....	615
Deke v. Huenkemeier, 260 Ill. 131.....	152, 151
Delta Bag Co. v. Kearns, 253 Ill. 365.....	329
Dennison v. Taylor, 142 Ill. 45.....	198
Dewhurst v. Mather, 1 B. W. C. C. 328.....	425

	PAGE.
DeWitt County v. Leeper, 209 Ill. 133.....	555
Dickinson v. Dodge, L. R. 2 Ch. Div. 463.....	95
Dietzen Co. v. Industrial Board, 279 Ill. 11.....	489, 430, 355
Dime Savings and Trust Co. v. Watson, 283 Ill. 276.....	611
Disourdi v. Maryland Casualty Co. 14 British Columbia, 256..	239
Donner v. Highway Comrs. 278 Ill. 189.....	553
Dorsey v. Wolcott, 173 Ill. 539.....	226
Douglass v. Reynolds, Byrne & Co. 7 Pet. 113.....	574
Dow v. Eyster, 79 Ill. 254.....	265
Dowie v. Driscoll, 203 Ill. 480.....	300
Dowling v. Lancashire Ins. Co. 92 Wis. 63.....	215
Drury v. Holden, 121 Ill. 130.....	61
Dunbar v. Dunbar, 254 Ill. 281.....	156
Dunn v. Addison Manual Train. School for Boys, 281 Ill. 352..	438
Dunn v. Chicago Industrial School, 280 Ill. 613.....	438

E

East St. Louis, City of, v. Illinois Cent. R. R. Co. 238 Ill. 296..	554
East St. Louis, City of, v. Vogel, 276 Ill. 490.....	412, 200
Easton v. Board of Review, 183 Ill. 255.....	460
Edwards v. Schillinger, 245 Ill. 231.....	581, 47
Eggleston v. Royal Trust Co. 205 Ill. 170.....	604
Elder v. Bales, 127 Ill. 425.....	141, 139
Eldridge v. Rowe, 2 Gilm. 91.....	192
Elliott v. Murray, 225 Ill. 107.....	569, 568
Ellis v. Dumond, 259 Ill. 483.....	563
Elzas v. Elzas, 183 Ill. 132; id. 160.....	266
Endsley v. Johns, 120 Ill. 469.....	147
Everett v. State, 62 Ga. 65.....	500
Ewertsen v. Gerstenberg, 186 Ill. 344.....	193
Eyer v. Williamson, 256 Ill. 540.....	471

F

Fahey v. Fahey, (Colo.) 18 L. R. A. (N. S.) 1147.....	155
Farmers' Nat. Bank v. Sperling, 113 Ill. 273.....	612
Farrenkoph v. Holm, 237 Ill. 94.....	300
Farwell v. Great Western Telegraph Co. 161 Ill. 522.....	168
Fawcett v. Iron Hall, 64 Conn. 170.....	48, 47
Fellows-Kimbrough v. Chicago City Ry. Co. 272 Ill. 71.....	406
Field v. Field, 215 Ill. 496.....	103
Firemen's Ins. Co. v. Thompson, 155 Ill. 204.....	107
Fisher v. Fay, 288 Ill. 11.....	338
Fitch v. Wetherbee, 110 Ill. 475.....	623, 622, 621, 422
Flack v. Warner, 278 Ill. 368.....	229, 223

	PAGE.
Flannigan v. Howard, 200 Ill. 396.....	472
Flinn v. Owen, 58 Ill. 111.....	599
Forbes v. Forbes, 261 Ill. 424.....	352
Forsyth v. Barnes, 228 Ill. 326.....	107, 103
Foster v. City of Alton, 173 Ill. 587.....	553
Foster v. Wadsworth-Howland Co. 168 Ill. 514.....	118
Francis v. Roades, 146 Ill. 635.....	371
Franklin Union v. People, 220 Ill. 355.....	181
Frawley v. Pennsylvania Casualty Co. 124 Fed. Rep. 259.....	110
Friedberg v. People, 102 Ill. 160.....	506
Frisch v. Chicago Great Western Ry. Co. 95 Minn. 398.....	120
Fry v. Morrison, 159 Ill. 244.....	562

G

Gahan v. People, 58 Ill. 160.....	584
Gainey v. People, 97 Ill. 270.....	504, 496
Gaunt v. Stevens, 241 Ill. 542.....	248
Gibson v. Leonard, 143 Ill. 182.....	119
Gillespie v. Rout, 40 Ill. 58.....	488
Gilman, Clinton and Springfield R. R. Co. v. Kelly, 77 Ill. 426..	165
Glanz v. Ziabek, 233 Ill. 22.....	530
Glos v. Garrett, 219 Ill. 208.....	531
Glover v. People, 188 Ill. 576.....	553
Goelz v. Goelz, 157 Ill. 33.....	371
Goff v. Goff, 60 W. Va. 9.....	155
Gorham v. Dodge, 122 Ill. 528.....	562
Gould v. Chicago Theological Seminary, 189 Ill. 282.....	600
Gould v. Magnolia Metal Co. 207 Ill. 172.....	390
Graceland Cemetery Co. v. People, 92 Ill. 619.....	153
Grady v. People, 125 Ill. 122.....	506
Gray v. Chicago, Milwaukee and St. Paul Ry. Co. 189 Ill. 400..	293
Gray v. Schofield, 175 Ill. 36.....	530
Green v. Chicago, Burl. and Quincy Ry. Co. 205 U. S. 530. 106,	104
Green v. Goff, 153 Ill. 534.....	612
Griggs v. Gear, 3 Gilm. 2.....	268, 266
Grimball v. Patton, 70 Ala. 626.....	273
Grindle v. Grindle, 240 Ill. 143.....	307
Gross v. People, 172 Ill. 571.....	553
Grove v. City of Fort Wayne, 45 Ind. 429.....	406
Gundling v. City of Chicago, 176 Ill. 340.....	212

H

Hackett v. Chicago City Railway Co. 235 Ill. 116.....	45
Hagan v. Waldo, 168 Ill. 646.....	226
Hall v. Royal Neighbors, 231 Ill. 185.....	200

	PAGE.
Haller Sign Works v. Physical Culture School, 249 Ill. 436...	212
Hamilton v. Harvey, 121 Ill. 469.....	98
Hance v. Miller, 21 Ill. 636.....	574
Hanna v. Read, 102 Ill. 596.....	156
Hardin County v. McFarlan, 82 Ill. 138.....	236
Harmon v. Auditor of Public Accounts, 123 Ill. 122.....	555
Harrigan v. Boston Elevated Ry. Co. 190 Mass. 577.....	524
Harrigan v. County of Peoria, 262 Ill. 36.....	268, 266
Harris, <i>In re</i> , 221 U. S. 274.....	77
Harris v. Shebek, 151 Ill. 287.....	18
Harshbarger v. Carroll, 163 Ill. 636.....	352, 299
Hart v. Washington Park Club, 157 Ill. 9.....	35
Harter v. People, 204 Ill. 158.....	506
Hartford Life and Annuity Ins. Co. v. Gray, 91 Ill. 159.....	389
Harts v. Brown, 77 Ill. 226.....	165
Harty v. Glos, 272 Ill. 395.....	578
Harvey v. Aurora and Geneva Ry. Co. 174 Ill. 295.....	90, 89
Hayes v. Massachusetts Mutual Life Ins. Co. 125 Ill. 626.....	281
Hayes v. O'Brien, 149 Ill. 403.....	192
Haywood v. Collins, 60 Ill. 328.....	553
Heckle v. Grewe, 125 Ill. 58.....	399
Heed v. Industrial Com. 287 Ill. 505.....	317
Heineke v. Chicago Railways Co. 279 Ill. 210.....	406
Henderson v. Blackburn, 104 Ill. 227.....	274
Henderson v. Harness, 184 Ill. 520.....	512
Henry v. People, 198 Ill. 162.....	22
Hetfield v. Fowler, 60 Ill. 45.....	275, 274
Hibbard & Co. v. City of Chicago, 173 Ill. 91.....	405
Higgins v. Higgins, 219 Ill. 146.....	156
Higgins v. Lansingh, 154 Ill. 301.....	165
Highway Comrs. v. Lake Fork Dr. Dist. 246 Ill. 388. .383, 382, 381	
Highwood, City of, v. Chi. and Northwest. Ry. Co. 276 Ill. 98..	411
Hill Co. v. United States Guaranty Co. 250 Ill. 242.....	200
Hintz v. Hintz, 222 Ill. 248.....	226
Hirschman v. People, 101 Ill. 568.....	188
Hite v. Cincin., Indianapolis and West. R. R. Co. 284 Ill. 297..	294
Hitt v. Ormsbee, 14 Ill. 233.....	460
Hofmann v. Burris, 210 Ill. 587.....	151
Holbrook v. Ford, 153 Ill. 633.....	47
Hooker v. Midland Steel Co. 215 Ill. 444.....	164
Hopkins v. Hebard, 235 U. S. 287.....	266
Howe v. South Park Comrs. 119 Ill. 101.....	640, 59
Hoyne v. Danisch, 264 Ill. 467.....	131
Hoyt v. Northup, 256 Ill. 604.....	567
Huddleston v. Francis, 124 Ill. 195.....	131

	PAGE.
Hudnall v. Ham, 183 Ill. 486.....	138
Hudson v. Hudson, 287 Ill. 286.....	616, 567
Huston v. Smith, 248 Ill. 396.....	226
Hutchins v. Vandalia Levee District, 217 Ill. 561.....	90
Hutchinson v. Ulrich, 145 Ill. 336.....	193
Hutchison v. Kelly, 276 Ill. 438.....	600
Hutson v. Wood, 263 Ill. 376.....	422

I

Iglehart v. Crane & Wesson, 42 Ill. 261.....	60, 59
Illinois Central R. R. Co. v. Davidson, 225 Ill. 618.....	120
Illinois Central R. R. Co. v. O'Keefe, 168 Ill. 115.....	38
Illinois Malleable Iron Co. v. Michalek, 279 Ill. 221.....	182
Illinois Trust Co. v. St. L., I. M. & S. Ry. Co. 208 Ill. 419.....	88
Inman v. Swearingen, 198 Ill. 437.....	299
International Harvester Co. v. Kentucky, 234 U. S. 579...	106, 105
Iowa State Traveling Men's Ass'n v. Ruge, 242 Fed. Rep. 762..	110
Italian-Swiss Agricultural Colony v. Pease, 194 Ill. 98.....	391

J

Jacksonville, City of, v. Hamill, 178 Ill. 235.....	554
Jenkins v. Drane, 121 Ill. 217.....	140
Jenkins v. LaSalle County Coal Co. 264 Ill. 238.....	120, 119, 118
Johnson v. Chicago and Pacific Elevator Co. 105 Ill. 462.....	575
Johnson v. Johnson, 114 Ill. 611.....	589
Johnson v. United States, 228 U. S. 457.....	78
Johnston v. City of Chicago, 258 Ill. 494.....	405

K

Kankakee, City of, v. I. C. R. R. Co. 257 Ill. 298; 264 id. 69...	411
Karnes v. Lloyd, 52 Ill. 113.....	622
Keator v. Scranton Traction Co. 191 Pa. St. 102.....	33
Keely v. O'Conner, 106 Pa. St. 321.....	215
Kehl v. Taylor, 275 Ill. 346.....	375
Kelley v. Northern Trust Co. 190 Ill. 401.....	248
Kelley v. People's Nat. Fire Ins. Co. 262 Ill. 158.....	241
Kelly v. Bapst, 272 Ill. 237.....	616
Kelly v. People, 132 Ill. 363.....	584
Kelver v. New York, Chi. and St. L. R. R. Co. 126 N. Y. 365..	120
Kemp v. Division 241, 255 Ill. 213.....	183
Kenealy v. Glos, 241 Ill. 15.....	154
Kenna v. Calumet, Ham. and Southeast. R. R. Co. 284 Ill. 301..	71
Kern v. Beatty, 267 Ill. 127.....	638, 61
Kerr v. Miller, 259 Ill. 516.....	623, 622

	PAGE.
Kinnard v. Kinnard, 5 Watts, 110.....	275
Kinney v. People, 108 Ill. 519.....	504
Kipley v. People, 215 Ill. 358.....	504
Kirby v. Runals, 140 Ill. 289.....	248
Kirk v. Dearth Agency, 171 Ill. 207.....	198
Kirkpatrick v. Corning, 40 N. J. Eq. 241.....	306
Klein v. Independent Brewing Ass'n, 231 Ill. 594.....	168
Koch v. National Union Building Ass'n, 137 Ill. 497.....	98
Koch v. Streuter, 232 Ill. 594.....	293
Kochersperger v. Drake, 167 Ill. 122.....	547
Koelling v. Foster, 254 Ill. 494.....	562
Krieger v. Krieger, 221 Ill. 479.....	267
Kronmeyer v. Buck, 258 Ill. 586.....	226
Kuehner v. City of Freeport, 143 Ill. 92.....	554
Kuzak v. Anderson, 267 Ill. 609.....	554

L

Lachenmyer v. Gehlbach, 266 Ill. 11.....	205
Lake Forest, City of, v. Buckley, 276 Ill. 38.....	200
Lake View, Town of, v. Rose Hill Cemetery Co. 70 Ill. 191... ..	213
Lang v. Hedenberg, 277 Ill. 368.....	612
Lange v. Cullinan, 205 Ill. 365.....	567
Lanphier v. Desmond, 187 Ill. 370.....	298
Lansingh v. Dempster, 255 Ill. 161.....	611
Larabee v. Larabee, 240 Ill. 576.....	397
Larson v. City of Grand Forks, 3 Dak. 307.....	406
Larson v. Glos, 235 Ill. 584.....	637
Lathrop v. People, 197 Ill. 169.....	24
Latimer v. Latimer, 174 Ill. 418.....	352
Law v. Sanitary District of Chicago, 197 Ill. 523.....	392
Lefens v. Industrial Com. 286 Ill. 32.....	317
Lehr v. Murphy, 136 Wis. 92.....	47
Leitch v. People, 183 Ill. 569.....	553
Leopold v. People, 140 Ill. 552.....	183
Lessley v. Lessley, 44 Ill. 527.....	562
Levy v. Chicago Nat. Bank, 158 Ill. 88.....	267
Lewis v. Wilkinson, 113 N. Y. 485.....	198
Lichter v. Thiers, 139 Wis. 481.....	473
Ligare v. City of Chicago, 139 Ill. 46.....	89
Lincoln, City of, v. Chicago and Alton R. R. Co. 262 Ill. 11... ..	411
Litchfield Coal Co. v. Taylor, 81 Ill. 590.....	359
Lobstein v. Lehn, 120 Ill. 549.....	198
Louisville, N. C. & T. R. R. Co. v. Whitehead, 71 Miss. 451... ..	454
Loven v. People, 158 Ill. 159.....	183
Lurton v. Rodgers, 139 Ill. 554.....	512

M	PAGE.
Madison v. Larmon, 170 Ill. 65.....	562
Manternach v. Studt, 240 Ill. 464.....	422
Marine Bank of Chicago v. Rushmore, 28 Ill. 463.....	280
Mark Manf. Co. v. Industrial Com. 286 Ill. 620.....	319
Markley v. People, 171 Ill. 260.....	156, 154
Marler v. State, 68 Ala. 580.....	500
Marshal v. McDermitt, L. R. A. (1907C) 888.....	422
Marshall v. City of Pekin, 276 Ill. 187.....	51
Martin v. McCall, 247 Ill. 484.....	553
Masury's Estate, <i>In re</i> , 51 N. Y. Supp. 331; 159 N. Y. 532.....	483, 482
Matthews v. Kerfoot, 167 Ill. 313.....	192
McCarthy v. Spring Valley Coal Co. 232 Ill. 473.....	67
McCauley v. Coe, 150 Ill. 311.....	95
McCormick v. South Park Comrs. 150 Ill. 516.....	405
McCoy v. People, 175 Ill. 224.....	504
McCue v. Commonwealth, 78 Pa. St. 185.....	500
McCurley v. McCurley, 60 Md. 185.....	264
McDaniel v. Wetzel, 264 Ill. 212.....	514
McInturff v. Insurance Co. of North America, 248 Ill. 92....	639
McLaughlin v. Industrial Board, 281 Ill. 100.....	594, 50
Meadowcroft v. People, 163 Ill. 56.....	279
Meier v. Hilton, 257 Ill. 174.....	622
Mercy Hospital v. City of Chicago, 187 Ill. 400.....	123
Merlo v. Coal and Mining Co. 258 Ill. 328.....	359, 248
Merrifield v. People, 212 Ill. 400.....	548
Mette v. Feltgen, 148 Ill. 357.....	248, 245
Michigan Central R. R. Co. v. Keohane, 31 Ill. 144.....	197
Miller v. McAlister, 197 Ill. 72.....	512
Miller v. People, 39 Ill. 457.....	313
Miller v. Rowan, 251 Ill. 344.....	553
Milligan v. Miller, 253 Ill. 511.....	640
Milwaukee, City of, v. Miller, 154 Wis. 652.....	133
Milwaukee Western Fuel Co. v. Industrial Com. 159 Wis. 635.....	430
Minkler v. Simons, 172 Ill. 323.....	471
Mitchell v. Mitchell, 267 Ill. 244.....	226
Mix v. Beach, 46 Ill. 311.....	637
Monarch Coal and Mining Co. v. Hand, 197 Ill. 288.....	61
Mooney v. Valentynovicz, 255 Ill. 118.....	267
Moore v. Brandenburg, 248 Ill. 232.....	362
Morris v. Robey, 73 Ill. 462.....	513, 512
Mueller Construction Co. v. Industrial Board, 283 Ill. 148.....	489, 488
Mugler v. Kansas, 123 U. S. 623.....	212
Murray v. Vanderbilt, 39 Barb. 140.....	46

N

PAGE.

Napieralski v. West Chicago Park Comrs.	260 Ill. 628.....	553
National Exchange Bank v. Wiley,	195 U. S. 257.....	103
Nelson Railroad Con. Co. v. Industrial Com.	286 Ill. 632..490,	431
New York, Chi. and St. L. R. R. Co. v. Blumenthal,	160 Ill. 40.	35
Newberry v. Blatchford,	106 Ill. 584.....	59
Nicewander v. Nicewander,	151 Ill. 156.....	398
Nichoud v. Gerod, 4 How.	503.....	165
Niles Center, Village of, v. Schmitz,	261 Ill. 467.....	125
North American Ins. Co. v. Yates,	214 Ill. 272.....	46
North Chicago Street Railroad Co. v. Kaspers,	186 Ill. 246..38,	32
North Fork Drainage District v. Rector District,	266 Ill. 536..	555
Northern Illinois Trac. Co. v. Industrial Board,	279 Ill. 565...	317
Nowak v. Dombrowski,	267 Ill. 103.....	293
Nowak v. National Car Coupler Co.	260 Ill. 260.....	164
Nyburg & Provine v. Pearce,	85 Ill. 393.....	59

O

O'Brien v. Estate of Rhembe,	269 Ill. 592.....	601
O'Brien v. O'Brien,	285 Ill. 570.....	299
O'Callaghan v. Dellwood Park Co.	242 Ill. 336.....	35
Ogden, Sheldon & Co. v. City of Chicago,	224 Ill. 294.....	376
Ohio Building Vault Co. v. Indus. Board,	277 Ill. 96..365, 333,	317
Ohio and Mississippi Ry. Co. v. People,	123 Ill. 467.....	88
Ohio and Mississippi Ry. Co. v. People,	123 Ill. 648.....	382
Old Wayne Mutual Life Ass'n v. McDonough,	204 U. S. 8.110,	107
Orin v. Steinkamp,	54 Ohio St. 284.....	215
O'Shea v. People,	218 Ill. 352.....	17
Otis v. Spencer,	102 Ill. 622.....	568
Ottawa, City of, v. Colwell,	260 Ill. 548.....	554
Owners of Lands v. People,	113 Ill. 296.....	216
Owen v. Crumbaugh,	228 Ill. 380.....	398

P

Pahlman v. King,	49 Ill. 266.....	399
Painter v. People,	147 Ill. 444.....	188
Palenske v. Palenske,	281 Ill. 574.....	562
Palestine, Village of, v. Siler,	225 Ill. 630.....	405
Parker-Washington Co. v. Industrial Board,	274 Ill. 498...239,	129
Parsons v. People,	218 Ill. 386.....	504
Pauley v. Steam Gauge and Lantern Co.	15 L. R. A. 194.....	215
Peak v. People,	76 Ill. 289.....	17
Pekin Cooperage Co. v. Industrial Com.	285 Ill. 31.....	317
Penny v. Crane Bros. Manf. Co.	80 Ill. 244.....	574
People v. Abbott,	274 Ill. 380.....	375

	PAGE.
People v. Anderson, 239 Ill. 168.....	20
People v. Barber, 265 Ill. 316.....	559, 557
People v. Barnes, 270 Ill. 574.....	20
People v. Bates, 266 Ill. 55.....	457
People v. Blair, 266 Ill. 70.....	313
People v. Blevins, 251 Ill. 381.....	498, 497
People v. Block, 276 Ill. 286.....	382
People v. Bowman, 253 Ill. 234.....	285
People v. Brunstrom, 274 Ill. 62.....	248
People v. Bug River Drainage District, 189 Ill. 55.....	559
People v. Burkhalter, 247 Ill. 600.....	547
People v. Busse, 240 Ill. 338.....	363
People v. Carpenter, 264 Ill. 400.....	548, 483
People v. Cassidy, 283 Ill. 398.....	312
People v. Chicago, Burling. and Quincy R. R. Co. 282 Ill. 206..	456
People v. Chicago and Eastern Illinois R. R. Co. 281 Ill. 177...	457
People v. Chicago and Northwestern Ry. Co. 286 Ill. 384.....	288
People v. Clark, 283 Ill. 221.....	133
People v. Cleve., Cin., Chi. and St. L. Ry. Co. 231 Ill. 209..	552, 285
People v. Cleve., Cin., Chi. and St. L. Ry. Co. 288 Ill. 70.....	288
People v. Connors, 246 Ill. 9.....	586
People v. Continental Beneficial Ass'n, 204 Ill. App. 501.....	41
People v. County of Williamson, 286 Ill. 44.....	440
People v. Davis, 269 Ill. 256.....	24
People v. Dennis, 246 Ill. 559.....	584
People v. Dix, 280 Ill. 158.....	175
People v. Drainage Comrs. 282 Ill. 514.....	558
People v. Deutsche Gemeinde, 249 Ill. 132.....	286
People v. Falkovitch, 280 Ill. 321.....	346
People v. Feinberg, 237 Ill. 348.....	586
People v. Fenton and Thomson R. R. Co. 252 Ill. 372..	552, 382, 381
People v. Forster, 280 Ill. 486.....	280
People v. Freeland, 284 Ill. 190.....	312
People v. Grosenheider, 266 Ill. 324.....	496
People v. Harper, 244 Ill. 121.....	554
People v. Hartenbower, 283 Ill. 591.....	279, 78
People v. Hassler, 262 Ill. 133.....	457
People v. Healy, 230 Ill. 280.....	559
People v. Heidelberg Garden Co. 233 Ill. 290.....	606
People v. Highway Comrs. 270 Ill. 141.....	131
People v. Horchler, 231 Ill. 566.....	586
People v. Jennings, 252 Ill. 534.....	503
People v. Keener, 194 Ill. 16.....	457
People v. Keithley, 225 Ill. 30.....	152
People v. Kelley, 218 Ill. 509.....	549, 547

	PAGE.
People v. Klee, 282 Ill. 440.....	285
People v. Lee, 237 Ill. 272.....	19
People v. Lukoszus, 242 Ill. 101.....	313
People v. Lurie, 276 Ill. 630.....	17
People v. Madison, 280 Ill. 96.....	175
People v. Mathews, 282 Ill. 85.....	338
People v. McCann, 247 Ill. 130.....	586
People v. McCullough, 210 Ill. 488.....	506
People v. Moeller, 260 Ill. 375.....	503
People v. Munday, 280 Ill. 32.....	78
People v. Nall, 242 Ill. 284.....	20
People v. New York Central R. R. Co. 283 Ill. 334.....	174
People v. O'Connor, 239 Ill. 272.....	559
People v. Pasfield, 284 Ill. 450.....	477
People v. Pezutto, 255 Ill. 583.....	312
People v. Porter, 287 Ill. 401.....	548
People v. Raymond, 186 Ill. 407.....	439
People v. Reynolds, 5 Gilm. 1.....	215
People v. Ross, 272 Ill. 63.....	552, 285
People v. Sandberg Co. 282 Ill. 245; 277 id. 567.....	287
People v. Scott, 284 Ill. 465.....	505
People v. Seelye, 146 Ill. 189.....	553
People v. Shortall, 287 Ill. 150.....	457, 456
People v. Simpson, 270 Ill. 540.....	505, 504
People v. Snyder, 279 Ill. 435.....	188
People v. Stitt, 280 Ill. 553.....	175
People v. Strauch, 240 Ill. 60.....	280
People v. Talmadge, 194 Ill. 67.....	554
People v. Thomas, 272 Ill. 558.....	20
People v. Village of Oak Park, 266 Ill. 365.....	213
People v. Vogt, 262 Ill. 170.....	289, 285
People v. Wayman, 256 Ill. 151.....	88
People v. Weigley, 155 Ill. 491.....	422, 420
People v. Weis, 275 Ill. 581.....	336, 174
People v. Wells, 255 Ill. 450.....	267
People v. Williams, 242 Ill. 197.....	22
People v. Willison, 237 Ill. 584.....	405
People v. Wright, 284 Ill. 339.....	175
People v. Wright, 287 Ill. 580.....	506
People v. Zajicek, 233 Ill. 198.....	18
People's Tobacco Co. v. American Tobacco Co. 246 U. S. 79...	106
Peoria, City of, v. Smith, 232 Ill. 561.....	125
Peoria County v. Gordon, 82 Ill. 435.....	518
Peoria Terminal Co. v. Industrial Board, 279 Ill. 352.....	425
Perisho v. People, 185 Ill. 334.....	553

	PAGE.
Perry County v. City of DuQuoin, 99 Ill. 479.....	443
Peru, City of, v. Bartels, 214 Ill. 515.....	554
Peterson & Co. v. Industrial Board, 281 Ill. 326.....	317
Phelps v. Curts, 80 Ill. 109.....	198
Phenix Ins. Co. v. Stocks, 149 Ill. 319.....	390
Piltz v. Supreme Chamber, 19 Atl. Rep. (N. J.) 668.....	46
Policemen's Benevolent Ass'n v. Ryce, 213 Ill. 9.....	589
Pooler v. Cristman, 145 Ill. 405.....	399
Popper v. Supreme Council, 70 N. Y. Supp. 637.....	46
Purcell, City of, v. Stubblefield, 41 Okla. 562.....	406

R

Reed v. Douthit, 62 Ill. 348.....	299
Reed v. Ohio and Mississippi Ry. Co. 126 Ill. 48.....	89
Reedy v. Millizen, 155 Ill. 636.....	589
Rheinwald, <i>In re</i> , 153 N. Y. Supp. 598.....	133
Richards v. People, 81 Ill. 551.....	420
Richardson v. Trubey, 250 Ill. 577.....	562
Robinson v. Stow, 39 Ill. 568.....	192
Roe v. Taylor, 45 Ill. 485.....	397
Rose v. King, 49 Ohio St. 213.....	214
Rosenthal v. People, 211 Ill. 306.....	548, 547
Rothschild & Co. v. Steger Piano Co. 256 Ill. 196.....	108
Rountree v. Smith, 152 Ill. 493.....	568
Russell v. Mitchell, 223 Ill. 438.....	568
Rutherford v. Morris, 77 Ill. 397.....	399
Ryan v. Foreman, 262 Ill. 175.....	472

S

Sabella v. Brazeleirs, 6 Neg. & Comp. Cas. Ann. (N. J.) 958..	425
Sadler v. Mobile Life Ins. Co. 60 Miss. 391.....	110
Salem, City of, v. Webster, 192 Ill. 369.....	69
Sanborn v. Kimball, 106 Me. 355.....	328
Sanitary District v. Industrial Board, 282 Ill. 182.....	51
Savoy Hotel Co. v. Industrial Board, 279 Ill. 329.....	365
Sayles v. Christie, 187 Ill. 420.....	472
Schaefer v. Safety Deposit Co. 281 Ill. 43.....	328, 327
Schaefer v. Wunderle, 154 Ill. 577.....	267, 266
Schenck v. Ballou, 253 Ill. 415.....	98
Schmidt, <i>In re</i> , 15 Mont. 117.....	563
Schneider v. Manning, 121 Ill. 376.....	398
Schnier v. People, 23 Ill. 11.....	502
School Inspectors v. People, 20 Ill. 526.....	236
Schott v. Harvey, 105 Pa. St. 222.....	215
Schuck v. Gerlach, 101 Ill. 338.....	623

	PAGE.
Schuknecht v. Schultz, 212 Ill. 43.....	562
Schwabacker v. Riddle, 99 Ill. 343.....	146
Scott v. Scott, 212 Ill. 597.....	398
Scott v. Scott, 23 L. R. A. (N. S.) 716.....	275
Seagraves v. City of Alton, 13 Ill. 366.....	443
Security Savings and Loan Ass'n v. Moore, 151 Ind. 174.....	48, 47
Seith v. Commonwealth Electric Co. 241 Ill. 252.....	119
Sewell v. Moore, 166 Pa. St. 570.....	215
Seymour v. Union Stock Yards Co. 224 Ill. 579.....	120
Shackelton v. Seabee, 86 Ill. 616.....	352
Shaeffer v. DeGrotola, 85 N. J. L. 444.....	425
Sheehan v. People, 131 Ill. 22.....	313
Sheriffs v. City of Chicago, 213 Ill. 620.....	375, 374
Shirwin v. People, 69 Ill. 55.....	221
Siegel v. Borland, 191 Ill. 107.....	61
Simmons v. Saul, 138 U. S. 439.....	103
Skakel v. Cycle Trade Publishing Co. 237 Ill. 482.....	511
Skinner v. Baker, 79 Ill. 496.....	298
Skinner v. McDowell, 169 Ill. 365.....	274
Slater v. Gruger, 165 Ill. 329.....	248
Smith v. County of Logan, 284 Ill. 163.....	537
Smith v. Henline, 174 Ill. 184.....	248
Smith-Lohr Coal Co. v. Industrial Com. 286 Ill. 34.....	360, 357
Snell v. Weldon, 239 Ill. 279.....	397
Sny Island Levee Drainage District v. Shaw, 252 Ill. 142.....	382
Spears v. People, 220 Ill. 72.....	186
Spence v. Central Accident Ins. Co. 236 Ill. 444.....	388
Spiegler v. City of Chicago, 216 Ill. 114.....	216, 212
Spiehs v. Insull, 278 Ill. 184.....	248
Spies v. People, 122 Ill. 1.....	188
Spitzer v. Schlatt, 249 Ill. 416.....	531
Stamm v. Northwestern Mutual Benefit Ass'n, 65 Mich. 317..	47
Star Brewery Co. v. Primas, 163 Ill. 652.....	293
State v. Elsham, 70 Iowa, 531.....	18
State v. Lawlor, 28 Minn. 216.....	500
St. Clair v. Cox, 106 U. S. 250.....	104
Steenberg v. People, 164 Ill. 478.....	553
Steffy v. People, 130 Ill. 98.....	24
Stephens v. Hoffman, 275 Ill. 497.....	24
Stinson v. Anderson, 96 Ill. 373.....	568
St. Louis, Jackson. and Chi. R. R. Co. v. Mathers, 71 Ill. 592..	293
St. Louis and Southwest. Ry. Co. v. Alexander, 227 U. S. 218..	104
Stockton v. Central Railroad Co. 50 N. J. Eq. 80.....	46
Stoker v. Greenup, 18 Ill. 27.....	513
Stoller v. Doyle, 257 Ill. 369.....	205, 204
Stott v. City of Chicago, 205 Ill. 281.....	606

	PAGE
Stribling v. Prettyman, 57 Ill. 371.....	375
Strickland v. Strickland, 80 Ark. 452.....	264
Stubbs v. Industrial Board, 280 Ill. 208.....	526, 525
Suburban Ice Co. v. Industrial Board, 274 Ill. 630.....	129
Sullivan v. Collins, 107 Wis. 291.....	70
Sulzberger & Sons Co. v. Industrial Com. 285 Ill. 31.....	317
Sumner v. Village of Milford, 214 Ill. 388.....	553
Sundine, <i>In re</i> , 218 Mass. 1.....	430
Supreme Sitting Order of Iron Hall v. Grigsby, 178 Ill. 57....	88
Sweezy v. Chandler, 11 Ill. 445.....	622

T

Taylor v. Illinois Commercial Men's Ass'n, 84 Neb. 799.....	110
Templeton v. People, 27 Mich. 500.....	500
Thayer v. Thayer, 39 Am. Dec. 211.....	155
Thede Bros. v. Industrial Com. 285 Ill. 483.....	595
Thomas v. Wiggers, 41 Ill. 470.....	192
Thompson v. Karme, 268 Ill. 168.....	600
Thompson v. Owen, 174 Ill. 229.....	600
Thompson v. Whitman, 18 Wall. 457.....	107, 103
Thompson Co. v. Whitehed, 185 Ill. 454.....	88
Tomlinson v. Iowa Traveling Men's Ass'n, 251 Fed. Rep. 171..	109
Tomson v. Iowa State Traveling Men's Ass'n, 88 Neb. 399....	110
Tosetti Brewing Co. v. Koehler, 200 Ill. 369.....	612, 265
Townsend v. Gash, 267 Ill. 578.....	382
Tracy v. City of Chicago, 24 Ill. 500.....	192
Treat v. Merchants Life Ass'n, 198 Ill. 431.....	387
Trost v. Ketteler Manual Training School, 282 Ill. 504.....	438
Truman, <i>In re</i> , 27 R. I. 209.....	474
Trustees v. Lincoln Park Comrs. 282 Ill. 348.....	440
Tryce v. Dittus, 199 Ill. 189.....	98
Tucker v. People, 122 Ill. 583.....	527

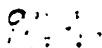
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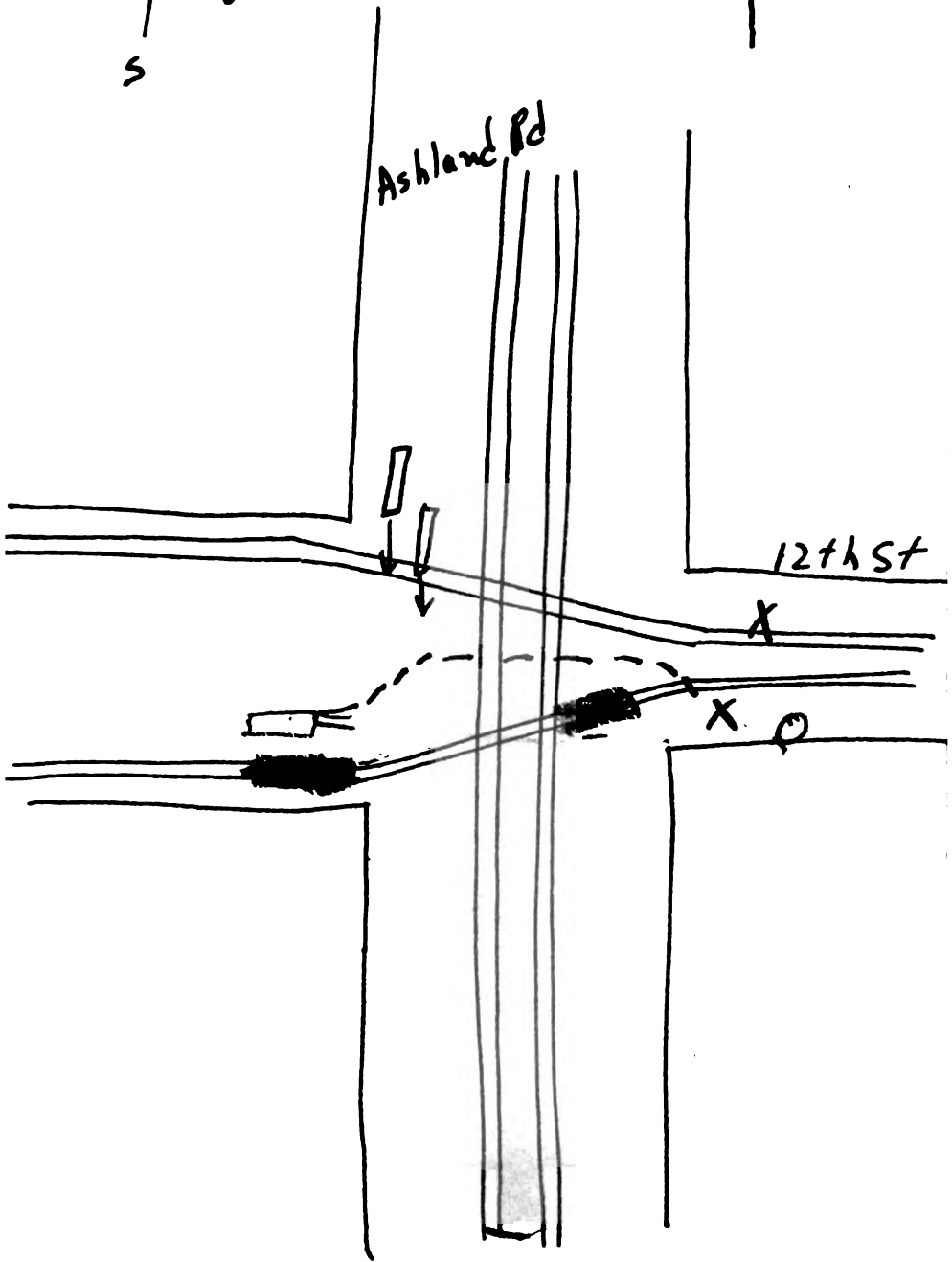
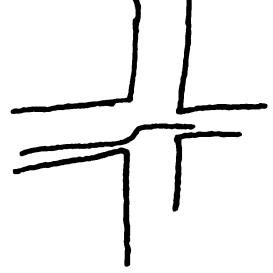
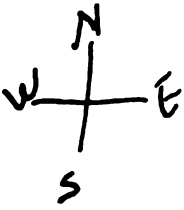
Union Mutual Life Ins. Co. v. Kirchoff, 133 Ill. 368.....	61
United States v. Hyde, 145 Ill. 393.....	306
United States Fidelity Co. v. First Nat. Bank, 233 Ill. 475....	388

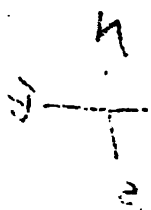
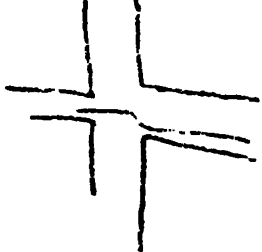
V

Valter v. Blavka, 195 Ill. 610.....	299
VanGundy v. Hill, 262 Ill. 162.....	513
Vaughan's Seed Store v. Simonini, 275 Ill. 477.....	51
Victor Chemical Works v. Indus. Board, 274 Ill. 11..	425, 354, 334
Voorhees v. Blum, 274 Ill. 319.....	193
Voorhees v. Campbell, 275 Ill. 292.....	168

W	PAGE.
Wabash R. R. Co. v. Billings, 212 Ill. 37.....	69
Walker v. Hough, 59 Ill. 375.....	146
Walker v. Walker, 283 Ill. 11.....	472, 471
Walkerly, Matter of, 108 Cal. 659.....	562
Wallace v. Noland, 246 Ill. 535.....	473
Ward v. Caverly, 276 Ill. 416.....	352
Ward v. Conklin, 232 Ill. 553.....	616
Wardner v. Baptist Memorial Board, 232 Ill. 606.....	274
Warner v. King, 267 Ill. 82.....	131
Warren v. Richmond, 53 Ill. 52.....	95
Washington v. Louisville and Nashville Ry. Co. 136 Ill. 49...	362
Watseka, City of, v. Orebaugh, 266 Ill. 579.....	554
Watson v. Woolverton, 41 Ill. 241.....	399
Watts v. Rice, 192 Ill. 123.....	266
Weber v. Christen, 121 Ill. 91.....	298
Welsch v. Belleville Savings Bank, 94 Ill. 191.....	274
Wendzinski v. Madison Coal Corp. 282 Ill. 32.....	133
Weskalnies v. Hesterman, 288 Ill. 199.....	196
Western Electric Co. v. Industrial Com. 285 Ill. 279.....	317
Wetzel v. Firebaugh, 251 Ill. 190.....	307
Wheeler v. City of Fort Dodge, 131 Iowa, 566.....	406
Wheeler v. United States, 226 U. S. 478.....	78
Whilt v. Public Service Corp. 76 N. J. L. 729.....	33
Whitcomb v. Rodman, 156 Ill. 116.....	470
White v. White, 103 Ill. 438.....	59
Whittemore v. Russell, 80 Me. 297.....	275
Wilbanks v. Wilbanks, 18 Ill. 17.....	562
Wilenou v. Handlon, 207 Ill. 104.....	569
Wilkinson v. People, 226 Ill. 135.....	530, 307
Willettts v. Willettts, 104 Ill. 122.....	230
Williams v. City of Chicago, 266 Ill. 267.....	212, 211
Willy v. Mulledy, 78 N. Y. 310.....	214
Wilson v. United Railway Co. 167 Mich. 107.....	33
Wilson v. Wilson, 158 Ill. 567.....	569
Wilson v. Wilson, 261 Ill. 174.....	471
Wilson v. Wilson, 73 Mich. 620.....	264
Winnetka, Village of, v. Taylor, 288 Ill. 624.....	377
Wisconsin Steel Co. v. Industrial Com. 288 Ill. 206.....	488, 365
Wolf v. Schwill, 282 Ill. 189.....	191, 190
Woodman v. Illinois Trust and Savings Bank, 211 Ill. 578.....	399
Woodward v. Brooks, 128 Ill. 222.....	581
Worrell v. Forsyth, 141 Ill. 22.....	61
Wren v. Moss, 2 Gilm. 72.....	264
Wyman v. City of Chicago, 254 Ill. 202.....	531







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